No. A-1048

Supreme Court, U. S.
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80-193

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

HENRY BUCZYNSKI, ALEX BORUSOVIC and OTHER RETIREES SIMILARLY SITUATED,

Petitioners,

v.

THE GENERAL MOTORS CORPORATION,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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Questions Presented

1. Whether a provision in respondent's pension plan which sanctions a forfeiture of vested retirement benefits by offsetting the amount of a subsequent worker's compensation award against the retiree's pension is unlawful under the Employee Retirement Income Security Act of 1974, 29 U.S.C. 1053.

2. Whether Chapter 156 of the New Jersey Laws of 1977, amending N.J.S.A. 34:15-29 (prohibiting offsets of workers' compensation awards against retirement pensions) is a proper exercise of state power, not pre-empted by E.R.I.S.A., 29 U.S.C. 1144.

Parties to the Proceeding

Plaintiffs-Appellees-Petitioners in Case No. 79-1668:

Henry Buczynski, Alex Borusovic and Other Retirees Similarly Situated

Defendant-Appellant-Respondent in Case No. 79-1668:

The General Motors Corporation

Intervenor:

State of New Jersey

As *Amicus Curiae*:

Carmen F. Gargon, Frank E. Doumont, Robert Milanovich, Wayne C. Banks, Michael E. Barna, Paul J. Miller and George Zihol

Gray Panthers

Shenango, Inc., U.S. Steel Corp., Crucible Inc., Jones & Laughlin Steel Corporation, Mesta Machine Company, Pullman-Standard and Wheeling-Pittsburgh Steel Corp.

United States (Tax Division, Department of Justice)

Plaintiff-Appellees in Case No. 19-1534:

Joseph Allessi, Raymond Buisson, Stephen Michalski, Charles Repka, Helen Vogt and T. Edward White

Defendants-Appellants in Case No. 19-1534:

Raybestos-Manhattan, Inc. and Raybestos-Manhattan, Inc. Employee Retirement Plan

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No. A-1048

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

HENRY BUCZYNSKI, ALEX BORUSOVIC and OTHER RETIREES SIMILARLY SITUATED,

Petitioners,

v.

THE GENERAL MOTORS CORPORATION,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Statement of Jurisdiction

The Judgment of the Court of Appeals was entered on February 15, 1980. Said Judgment was certified and issued in lieu of a formal mandate on March 27, 1980.

A timely Petition for re-hearing was filed and was denied on March 19, 1980. On June 2, 1980, this Honorable Court entered an ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI TO AUGUST 16, 1980.

The jurisdiction of this Court is envoked under 28 U.S.C. §1254(1).

Statutes and Regulations Involved

The following Statutes and Regulations, which are involved in this case are set forth in Appendix D, infra:

29 U.S.C. §1002(19)

29 U.S.C. §1053(a)

29 U.S.C. §1144(a)

N.J.S.A. 34:15-29

Statement of the Case

On August 5, 1977, plaintiff-petitioners, Henry Buczynski and Alex Borusovic, on behalf of themselves and "all other retired members of the International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, similarly situated," instituted the instant action against The General Motors Hourly-Rate Employees Pension Plan (hereinafter referred to as the GM Pension Plan), which conditions the right to vested pension benefits by allowing the deduction of workers' compensation benefits received by a retiree from pension benefits otherwise payable to him. Plaintiff-respondents' complaint also sought the invalidation of this pension plan provision on the basis of N.J.S.A. 34:15-29, as amended by Chapter 156 of the Laws of 1977 of the State of New Jersey (hereinafter referred to as Chapter 156), which provides that:

> The right of compensation granted by this chapter [the New Jersey Worker's Compensation Act] may be set off against disability pension benefits or payments but shall not be set off against employees' retirement pension benefits or payments. (A12a)

The above-mentioned action was removed to the United States District Court of the District of New Jersey on August 9, 1977 (A13a-15a), on the motion of respondent pursuant to 28 U.S.C. §1441. On August 9, 1978, an Order certifying class action was entered by consent of the parties pursuant to Federal Rule of Civil Procedure 23(b)2 (A50a-51a).

The plaintiffs are all retired employees of the General Motors Corporation who, at the time of their retirement, were employed by the General Motors Corporation in New Jersey. Each member of the plaintiff class was receiving a pension under the GM Pension Plan when he collected a workers' compensation award for a work-related injury. Plaintiff Buczynski received approximately $2,500.00, and plaintiff Borusovic received approximately $2,300.00. The full amount of these awards were subsequently deducted from their vested pension benefit under Article IV, Section 2 of the GM Pension Plan, which provides:

> Section 2. Deductions of Workmen's Compensation
>
> In determining the monthly benefits payable under this Plan, a deduction shall be made *unless prohibited by law,* equivalent to all or any part of of Workmen's Compensation (including compromise or redemption settlements) payable to such employee by reason of any law of the United States, or any political subdivision thereof, which has been or shall be enacted provided that such deductions shall be to the extent that such Workmen's Compensation has been provided by premiums, taxes or other payments paid by or at the expense of the Corporation, except that no deduction shall be made for the following:
>
> (a) Workmen's Compensation payments specifically allocated for hospitalization or medical expense, fixed

> statutory payments for the loss of any bodily member, or 100% loss of use of any bodily member, or payments for the loss of industrial vision.
>
> (b) Compromise or redemption settlements payable prior to the date monthly pension benefits first become payable.
>
> (c) Workmen's Compensation payments paid under a claim filed not later than two years after the breaking of seniority. (A28a)

On August 24, 1978, the District Court issued a Memorandum Opinion in which it held that section 2 of Article IV of the GM Pension Plan constituted an illegal forfeiture of vested pension benefits under §203(a) of E.R.I.S.A., 29 U.S.C. §1053(a). The Court also determined that Chapter 156 of New Jersey Law was not pre-empted by E.R.I.S.A. See Appendix B, *infra.* Upon a motion by respondent for reconsideration, the District Court, on December 20, 1978 issued a second Opinion and an Order reaffirming its previous Decision. (A67a-75a).

Upon appeal by respondent, General Motors Corporation, and with the consolidation of the above-captioned case with the unreported decision in *Joseph Allessi, et al.* v. *Raybestos-Manhattan, Inc., et al.* (Docket No. 79-1534), which invalidated a similar pension plan provision, a three judge panel for the United States Court of Appeals for the Third Circuit reversed and remanded the decision of the District Court.

REASONS FOR GRANTING THE WRIT

1. The issue raised in question 1 is of paramount importance in that it involves the construction of §1053 of E.R.I.S.A. which has never been decided by this Court, and will affect the rights of retirees of over 7,000 pension plans across the United States.

The scope and purpose of E.R.I.S.A. is to provide a comprehensive nationwide Federal program for the protection of retirees vested pension benefits. Congressional policy, as embodied in the language of E.R.I.S.A., §2, 29 U.S.C. §1002, manifests the clear intention of Congress to make sure that if a worker has been promised a pension upon retirement and he has fulfilled the requirements for obtaining vested benefits, that he actually receive it. *Nachman Corporation* v. *Pension Benefit Guarantee Corp., et al.,* 48 U.S.L.W. 4524 (No. 78-1557, decided May 12, 1980).

The statutory provisions which unambiguously delineate the non-forfeitability policy expressed by Congress with respect to vested pension benefits are set forth in §203(a), 29 U.S.C. §1053(a), and §3(19) and 29 U.S.C. §1002(19). These sections provide that subject to the four carefully delineated exceptions of §203(a)(3), 29 U.S.C. §1053(a)(3), an employee's pension benefits, once vested, are not to be forfeitable for any reason.

Section 203(a)(2) of E.R.I.S.A., 29 U.S.C. §1053(a)(2) provides several alternative minimum vesting schedules, the only conditions being age and years of service. The two named petitioners, having satisfied all vesting requirements with regard to age and years of service, and being entirely vested, have a non-forfeitable right to 100% of their accrued benefits. Nowhere within the above-enu-

merated sections or elsewhere in the Act, is there a provision excepting offsets of workers' compensation awards from the general non-forfeitability requirements.

Despite the language, purpose and policy of E.R.I.S.A., if the law is, as stated by the Third Circuit, retirees and pensioners of General Motors Pension Plan as well as 7,000 other pension plans throughout the nation will be deprived of much of the protection which the Act purports to give them. Pension plans will be able to condition the receipt of vested pension benefits upon factors other than age and service. Article IV, §2 of the GM Pension Plan imposed a condition to the receipt of vested pension benefits, namely, forbearance from exercising statutory rights under state workers' compensation and occupational disease laws. By exercising such rights, plaintiff-petitioners can be deprived of some or all of their pension rights. In addition, many pensioners with more severe work-related disability awards can be expected to suffer major financial losses as a result of these pension forfeitures.

If the law is, as stated by the Third Circuit, pension plans will be able to reduce retirees' vested pension benefits through the imposition of offsets including, but not limited to, the subsequent receipt of a worker's compensation award. If the law is as the Third Circuit states, then the enjoyment of pension benefits which employees earn and on which they are entitled to rely, may be arbitrarily denied, even after the enactment of E.R.I.S.A.

In New Jersey, the only redress for a worker who is injured in the course of his employment, is filing a claim in the division of workers' compensation. Such a workers' compensation action is a statutory remedy, and is in lieu of the common law remedy of a tort action. If the Third Circuit decision is permitted to stand, provisions such as

Article IV, Section 2 of the GM Pension Plan will force an injured employee to elect whether to forego his statutory right to workers' compensation in order to collect his vested pension benefits, or to pursue his workers' compensation remedy only to have whatever award he receives set off against his retirement pension. The net result is to effectively deny such an employee of his only remedy for a job-related disability. Moreover, it would place maimed and injured retirees in the same economic position as their healthy counterparts without providing any additional benefits for the suffering and losses which would continue to burden them and diminish their enjoyment of life. There is no indication in the legislative history and language of E.R.I.S.A. that Congress intended this "harsh dilemma."

With the advent of the recent decision in *Nachman,* supra, this Honorable Court has made an important statement that E.R.I.S.A. was enacted to preclude the vestiges of previous pension practices which have the clear effect of depriving pensioners of their right to benefits. In *Nachman,* supra, the Court held that Congress did not intend to exclude otherwise vested benefits from E.R.I.S.A. coverage solely because an employer disclaims liability for deficiencies in a pension fund. Moreover, this Honorable Court reasoned that since the terms "vested" and "nonforfeitable" are to be used synonymously, any attempt by a pension plan to place a condition upon the receipt of vested pension benefits were impermissible forfeitures violative of the Act.

> As this Court stated in *Nachman,* §203(a) is a central provision in E.R.I.S.A. It requires generally that a plan treat an employee's benefits, to the extent that they have vested by virtue of him having his age and length of service requirements no greater than those specified in §203(a)(2), as not subject to

> forfeiture. A provision in a plan which was purported to sanction forfeiture of vested benefits for any reason, other than one listed in subsection (a)(3) would violate this section after January 1, 1976, its effective date . . . 48 U.S.L.W. 4526, n.10

It is respectfully submitted that the decision of the Third Circuit runs contrary to the above-cited observation by this Court in *Nachman,* supra. By interpreting the law in such a manner as to expand permissible forfeitures, the Third Circuit's opinion in this case is also in opposition to this Court's observation in *Nachman,* 48 U.S.L.W. at 4532, n.9 that:

> As the Chairman of the House Committee on Education and Labor explained with regard to an earlier bill's definition of "non-forfeitable" almost identical to that contained in 29 U.S.C. §1002(19) as finally enacted: "The definition of the term 'non-forfeitable' is intended to preclude any conditions to receipt of vested benefits other than those noted in the definition."

The opinion of the Third Circuit determined that Congress, under E.R.I.S.A., gave pension plans the right to make offsets against vested pension plan benefits in violation of the vesting and non-forfeitability requirements of E.R.I.S.A., 29 U.S.C. §1053(a). This Court should review this case in order to prevent the erosion of those protections which were clearly enumerated in the legislative history and statutory language of E.R.I.S.A.

The overwhelming weight of judicial authority under E.R.I.S.A., prior to the Third Circuit's decision herein, maintained that nearly identical offset provisions violated the minimum vesting standards of §203, 29 U.S.C. §1053 of E.R.I.S.A. In particular, in *Stong* v. *Bucyrus-Erie Co. and*

Bucyrus Hourly Retirement Plan, 472 F.Supp. 1088 (E.D. Wi. 1979), *recon. denied*, December 10, 1979, the Court held that the workers' compensation offset imposed conditions subsequent to an employee's right to his normal retirement benefits which were contrary to the above-mentioned provisions of E.R.I.S.A.

The pension plan provision invalidated in *Stong*, supra is the same provision currently being challenged, before the Third Circuit Court of Appeals, in seven consolidated class actions involving the steel industry. *Gargon* v. *Wheeling-Pittsburgh Steel Corp., et al.*, (Cir. No. 78-1367). Under the present situation, steelworkers in Milwaukee will not experience these pension offsets, while steelworkers in Pittsburgh, under the same basic steel contract, continue to have their vested pension benefits offset.

Moreover, in *Utility Union of America* v. *Consumers Power Co.*, 453 F.Supp 447 (E.D. Mich. 1978), the Court maintained that the plight of workers prompted the nonforfeitability language of E.R.I.S.A. This Court, citing statutory language and legislative history, concluded that Congress did not intend to exempt workers' compensation payments from the nonforfeitability requirement of E.R.I.S.A. It should be noted that the *Utility Workers* decision has been argued before the United States Court of Appeals for the Sixth Circuit in June of 1979, and a decision is expected soon.

The decision of the Third Circuit herein is also in conflict with other cases decided under the nonforfeitability standard of E.R.I.S.A. including *Riley* v. *MEBA Pension Trust*, 570 F.2d 406 (2d Cir. 1977), where the Second Circuit Court of Appeals held that:

> When section 203(a)(3)(B), provides that certain suspensions are not forfeitures, it necessarily implied that those not falling within its terms *are*.

The *Riley* Court concluded by maintaining that "each month's denial [of vested pension benefits] constitutes a separate forfeiture and a separate wrong" under E.R.I.S.A. 570 F.2d at 411.

The decision of the Third Circuit, in the case at bar, is also in conflict with the decision of the Eighth Circuit in *Winer* v. *Edison Brothers Stores Pension Plan,* 593 F.2d 307 (8th Cir. 1979) and with the decision of the Seventh Circuit in *Fremont* v. *McGraw-Edison,* 606 F.2d 752 (7th Cir. 1979) both of which held that any conditions upon receipt of nonforfeitable pension benefits were invalid.

By departing from these previous decisions, the Third Circuit has diluted the protection of retirees' vested pension benefits which E.R.I.S.A. was enacted to safeguard. There is nothing in the language, policy or history of E.R.I.S.A. to support the decision of the Third Circuit that workers' compensation offsets against vested pension benefits do not constitute impermissible forfeitures. This Court should review this case in order to protect the integrity of the Act and effectuate the intent of Congress, that being the protection of the rights of retirees and pensioners in this country.

2. Chapter 156 of the New Jersey Laws of 1977, amending N.J.S.A. 34:15-29 (prohibiting offsets of workers' compensation awards against retirement pensions) is a proper exercise of state power, not pre-empted by E.R.I.S.A., 29 U.S.C. 1144.

Chapter 156 of the New Jersey Laws of 1977, amending N.J.S.A. 34:15-29 (see Appendix D) became effective July 14, 1977 as an amendment to the New Jersey Workers' Compensation Act. As the trial court correctly concluded in its first opinion, said statute is not concerned with pension plans qua pension plans but only with ensuring that an employee receives his rightful compensation benefits. (A61a). This Honorable Court has found that workers compensation is an area in which the State is deemed to have broad authority under the police power, *DiCanas* v. *Bica,* 424 U.S. 351 (1976). Although the pre-emption of §514(a) of E.R.I.S.A., 29 U.S.C. 1144 admittedly is broad, it does not show a clear congressional intent to pre-empt a law, which is part of the New Jersey Workers Compensation Act and which is not concerned with "pension plans qua pension plans." Absent a clear congressional intent to pre-empt, pre-emption should not be found, *Jones* v. *Rath Packing Co.,* 430 U.S. 519 (1977).

The State of New Jersey has manifested a strong interest in protecting workers in the employment relationship and in seeing that workers are compensated for work-related injuries, ever since the original enactment of the Workers' Compensation Statute in 1909. This State policy should be allowed to prevail provided it does not interfere with Federal regulation, *Merrill Lynch, Pierce, Fenner and Smith* v. *Ware,* 414 U.S. 117 (1973). The New Jersey law constitutes a ~~firm~~ exercise of police power proper since it does not interfere with the Federal regulatory

scheme in the area of benefit pensions and can operate in harmony with Federal law. It is respectfully submitted that the Third Circuit decision, finding the State law pre-empted by E.R.I.S.A., is in conflict with the previously cited decisions of this Court.

CONCLUSION

For the foregoing reasons, this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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APPENDIX A

Opinion of the United States Court of Appeals for the Third Circuit

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 79-1668

HENRY BUCZYNSKI, ALEX BORUSOVIC, and OTHER RETIREES SIMILARLY SITUATED,
Appellees

v.

THE GENERAL MOTORS CORPORATION,
Appellant

STATE OF NEW JERSEY,
Intervenor

(D.C. Civil No. 77-1644)

No. 79-1534

JOSEPH ALESSI, RAYMOND BUISSON, STEPHEN MICHALSKI, CHARLES REPKA, HELEN VOGT and T. EDWARD WHITE,
Appellees

v.

RAYBESTOS-MANHATTAN, INC., and RAYBESTOS-MANHATTAN, INC. EMPLOYEE RETIREMENT PLAN, jointly, severally or in the alternative,
Appellants

STATE OF NEW JERSEY,
Intervenor

Appendix A

(D.C. Civil No. 78-0434)

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

Argued: January 8, 1980

Before: GIBBONS, ROSENN and GARTH, *Circuit Judges*

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Appendix A

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Appendix A

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OPINION OF THE COURT

(Filed February 15, 1980)

GARTH, *Circuit Judge*

These two appeals pose a single question: whether the Employee Retirement Income Security Act of 1974 (ERISA) or the laws of New Jersey invalidate the provision of the pension plans of defendants General Motors and Raybestos-Manhattan authorizing reduction, or offset, of pension benefits by amounts received by the pensioner under a Workmen's Compensation statute. We conclude that these offset provisions are not unlawful under ERISA, and that the New Jersey statute prohibiting them is preempted by ERISA. We therefore reverse the district court orders which enjoined such offsets and which required payment to pension beneficiaries of those amounts which the pension trustees had offset in the past.

I.

Both these cases present similar fact patterns,[1] and procedural histories. General Motors (GM) and

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1. No material facts are in dispute in either case. In *Alessi*, all facts were stipulated. In *Buczynski*, the parties filed a stipulation of facts and the plaintiffs presented, at the instance of the district

Appendix A

Raybestos-Manhattan (Raybestos) maintain pension plans covered by ERISA, 29 U.S.C. §1001 *et seq.* (1976). Both pension plans provide that, under certain circumstances, benefits will be reduced by the amount of Workmen's Compensation payments received by plan participants.[2]

NOTE 1 — *(Continued)*
court, the testimony of Hubert Clodfelter. Clodfelter was a union negotiator for the United Auto Workers in 1970 when the GM pension plan was under consideration. He testified about the meaning of the "unless prohibited by law" clause in the GM offset provision. *See* note 2 *infra*.

2. The GM offset clause provides:

> Section 2. Deductions for Workmen's Compensation
>
> In determining the monthly benefits payable under this Plan, a deduction shall be made unless prohibited by law, equivalent to all or any part of Workmen's Compensation (including compromise or redemption settlements) payable to such employee by reason of any law of the United States, or any political subdivision thereof, which has been or shall be enacted, provided that such deductions shall be to the extent that such Workmen's Compensation has been provided by premiums, taxes or other payments paid by or at the expense of the Corporation, except that no deduction shall be made for the following:
>
> (a) Workmen's Compensation payments specifically allocated for hospitalization or medical expense, fixed statutory payments for the loss of any bodily member, or 100% loss of use of any bodily member, or payments for loss of industrial vision.
>
> (b) Compromise or redemption settlements payable prior to the date monthly pension benefits first become payable.
>
> (c) Workmen's Compensation payments paid under a claim filed not later than two years after the breaking of seniority.

The Raybestos offset clause provides:

> All Retirement Income payments shall be reduced by the entire amount of any and all payments the Member is eligible to receive under any and all statutes pertaining to workmen's compensation, occupational disease, unemployment compensation, cash sickness benefits, and similar laws, other than primary Social Security benefits, presently in effect or which may

Appendix A

In 1977, New Jersey enacted a statute expressly prohibiting such offset provisions. The statute, which became effective July 14, 1977, added the underscored sentence to N.J. Stat. Ann. §34:15-29 (Supp. 1979), a part of New Jersey's Workmen's Compensation program. The complete section now provides:

> The right of compensation granted by this chapter shall have the same preference against the assets of the employer as is now or may hereafter be allowed by law for a claim for unpaid wages for labor. Claims or payments due under this chapter shall not be assignable, and shall be exempt from all claims of creditors and from levy, execution or attachment. *The right of compensation granted by this chapter may be set off against disability pension benefits or payments but shall not be set off against employees' retirement pension benefits or payments.*

Shortly after this statute went into effect, the plaintiffs brought class actions[3] against the defendants in the

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be enacted from time to time, which payments are paid concurrently with the Retirement Income.

3. In *Alessi*, the request for class certification was abandoned after the case was removed to the federal courts, and the action was continued on behalf of the named plaintiffs only. In *Buczynski*, the following class was certified by consent of the parties:

> The certified class consists "of those persons who are retired members of the General Motors Corporation Hourly-Rate Employees Pension Plan who retired under the provisions of said Pension Plan as set forth in Exhibit A-1 to the Agreement between General Motors Corporation and the International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, dated November 11, 1970, November 19, 1973, or November 22, 1976, who retired with benefits payable for months commencing on or after April 1, 1971, and who, at the time of their retirement, were employed by General Motors Corporation in New Jersey." *See* order filed August 9, 1978.

Buczynski v. General Motors Corp., 456 F. Supp. 867, 868 n.1 (D.N.J. 1978).

New Jersey state courts. The named plaintiffs in each suit were former employees of the defendants who had recovered Workmen's Compensation judgments against the defendants and whose pension benefits were being reduced as a result.[4] The suits sought permanent injunctions against the offsets and recoupment damages for those offsets, alleged to be unlawful, which had already been made.

Both cases were removed by the defendants to the United States District Court for the District of New Jersey. Both district judges to whom the respective cases were assigned, reached the same result. The district court judge in *Buczynski* issued two published opinions. The first opinion is reported at 456 F. Supp. 867 (D.N.J. 1978). The second opinion, which denied reconsideration, is reported at 464 F. Supp. 133 (D.N.J. 1978). The district court judge in *Alessi* issued a single, unpublished letter opinion.

Although the complaints in both cases challenged the offsets only on the basis of the New Jersey statute, both courts found the offset invalid under §203(a) of ERISA, 29 U.S.C. §1053(a) (1976) (hereinafter §1053(a)). In so holding, both courts invalidated a regulation issued by the Treasury Department expressly authorizing the offset clauses, 26 C.F.R. §1.411(a)-4(a) (1979).[5] They also held that the New Jersey statute was

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4. One of the *Alessi* plaintiffs, Helen Vogt, had not yet begun to receive her plan benefits (which were deferred termination benefits rather than retirement payments) by the time suit was filed, and thus had not yet suffered the impact of the offset clause. She was scheduled to begin receiving termination benefits on February 1, 1979.

5. The *Buczynski* court's first opinion made no mention of the Treasury regulation. The regulation was only considered and found invalid in the opinion responding to GM's motion for reconsideration. *See* 464 F. Supp. at 134-36.

not superseded by ERISA's preemption clause, 29 U.S.C. §1144 (1976).[6]

General Motors and Raybestos bring these appeals, challenging the district courts' conclusions that the offsets are invalid under ERISA and that the New Jersey statute is not preempted. We address these issues in turn.[7]

II.

The plaintiffs claim that the defendants' offset is rendered unlawful by ERISA's antiforfeiture provision, 29 U.S.C. §1053(a) (1976). This section provides in pertinent part:

> (a) Each pension plan shall provide that an employee's right to his normal retirement benefit is

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6. The *Buczynski* court also held that it need not reach the preemption claim since it had already found that the offset was invalid under ERISA itself. *See* 456 F. Supp. at 872. Preemption was discussed, however, by assuming *arguendo* that the offset was *not* invalid under ERISA, *see id.* The court concluded that the New Jersey statute was not preempted, *id.* at 872-74.

After the *Buczynski* and *Alessi* opinions were issued, still another opinion of the district court of New Jersey addressing these questions was filed. Carpenter Technology Corp. v. Boyton, No. 78-1415 (D.N.J., Dec. 12, 1979). *Carpenter* diverged from *Buczynski* and *Alessi* by holding that ERISA did, indeed, preempt the New Jersey statute. *See* our discussion *infra* at Part III. The *Carpenter* court reached the same result as its predecessors, however, by holding that the Workmen's Compensation offset was prohibited by ERISA itself.

7. The State of New Jersey has intervened in both *Alessi* and *Buczynski*. In addition, several *amicus* briefs have been filed in *Buczynski*. The United States as *amicus* urges reversal of the district court. So do several steel companies, who are involved in litigation on this same issue in the Western District of Pennsylvania. These steel companies are: Crucible, Inc., Jones & Laughlin Steel Corp., Mesta Machine Co., Pullman-Standard, Shenango, Inc., United States Steel Corp., and Wheeling-Pittsburgh Steel Corp. The individual steelworkers, who are suing their employers on this issue, urge affirmance. The steelworkers are Carmen F. Gargon, Frank E. Doumont, Robert Milanovich, Wayne C. Banks, Michael E. Barna, Paul J. Miller, and George Zihol. The Gray Panthers, one of the *amici* permitted to file in *Buczynski*, urge affirmance as well.

nonforfeitable upon the attainment of normal retirement age and in addition shall satisfy the requirements of paragraphs (1) and (2) of this subsection.

A Treasury regulation, however, addresses the permissibility of offsets under ERISA's antiforfeiture provision and expressly authorizes such offsets, declaring them *not* to be prohibited forfeitures. This regulation provides in pertinent part:[8]

> Furthermore, nonforfeitable rights are not considered to be forfeitable by reason of the fact that they may be reduced to take into account benefits which

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8. This Treasury regulation was *not* issued under ERISA's antiforfeiture requirement found at 29 U.S.C. §1053(a) (1976), but rather under an antiforfeiture provision included in the Internal Revenue Code requirements for pension plans, 26 U.S.C. §411(a) (1976). The tax code requirement for pension plans was enacted in Title II of ERISA. ERISA expressly provides that Treasury Department regulations under the tax code pension provisions shall apply to the analogous provisions of ERISA codified in Title 29 of the United States Code. 29 U.S.C. §1202(c) (1976) provides:

> (c) Regulations prescribed by the Secretary of the Treasury under sections 410(a), 411, and 412 of Title 26 (relating to minimum participation standards, minimum vesting standards, and minimum funding standards, respectively) shall also apply to the minimum participation, vesting, and funding standards set forth in parts 2 and 3 of subtitle B of subchapter I of this chapter [which include 29 U.S.C. §1053(a)]. Except as otherwise expressly provided in this Act, the Secretary of Labor shall not prescribe other regulations under such parts, or apply the regulations prescribed by the Secretary of the Treasury under sections 410(a), 411, 412 of Title 26 and applicable to the minimum participation, vesting, and funding standards under such parts in a manner inconsistent with the way such regulations apply under sections 410(a), 411, and 412 of Title 26.

We thus conclude that the Treasury regulation issued under the antiforfeiture requirement of 26 U.S.C. §411(a) (1976) must, if valid, control our interpretation of 29 U.S.C. §1053(a) (1976) as well. None of the parties here contends otherwise. This issue is discussed at greater length in Baker v. Otis Elevator Co., No. 79-1185, slip. op. at 5-8 (3d Cir., Nov. 13, 1979).

> are provided under the Social Security Act or under any other Federal or State law and which are taken into account in determining plan benefits.

26 C.F.R. §1.411(a)-4(a) (1979).

In determining the legality of the Workmen's Compensation offset, then, we must begin our inquiry with this regulation, which, if held to be valid, would require us to sustain the offset provisions in the General Motors and Raybestos pension plans.

A.

In assessing the validity of 26 C.F.R. §1.411(a)-4(a) (1979), we first turn to a consideration of the character of the regulation. In this court's recent opinion in *Baker v. Otis Elevator Co.*, No. 79-1185 (3d Cir., Nov. 13, 1979), which also concerned the validity of a Treasury regulation interpreting a provision of ERISA, we recognized a distinction between two types of administrative regulations, with a corresponding distinction in the appropriate standard of review. We there stated:

> There can be no question but that the regulation with which we are here concerned is a legislative regulation which was issued pursuant to a clear delegation of rule making authority, *see* U.S.C. §1202(c) (1976). As Professor Davis has explained,
>
> > A legislative rule is the product of an exercise of delegated legislative power to make law through rules. An interpretative rule is any rule an agency issues without exercising delegated legislative power to make law through rules.
> >
> > The distinction between the two kinds of rules is fundamental. . . . Valid legislative rules have about the same effect as valid statutes; they are binding on courts. . . .
> >
> > [By contrast, however,] [c]ourts always have power to substitute their judgment for ad-

> ministrative judgment as to the content of interpretative rules, but they refrain in varying degrees from substituting judgment in various circumstances . . . .
>
> 2 K.C. Davis, Administrative Law Treatise, §7:8 at 36-37 (1979). We recognize the distinction in the nature of the two types of rules, leading in turn to a distinction in our standard of review. Our scope of review of legislative rules is far more restricted than the scope of our review of interpretative rules. *See id.*, at 37.

Slip. op. at 9-10.

After an analysis of the Supreme Court's decision in *Batterton v. Francis*, 432 U.S. 416 (1977), which addressed the same issue, we concluded in *Baker* that, to sustain a legislative regulation, "we need only determine . . . that its promulgation is not an abuse of discretion, that it is neither arbitrary or capricious, nor contrary to the governing statutory section and ERISA as a whole," slip op. at 11-12.

As in *Baker*, the Treasury Department regulation at issue here is plainly legislative in nature; it was issued pursuant to the same delegation of rule-making power as the regulation in *Baker*, which was there held to be legislative. *See* slip op. at 9; 29 U.S.C. 1202(c) (1976). It is thus subject to the limited review prescribed in *Baker*.[9]

The plaintiffs contend that the Treasury regulation must be struck down because it is inconsistent with the

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9. Neither district court here recognized that 26 C.F.R. §1.411(a)-4(a) (1979) is a *legislative* regulation. Other courts that have invalidated this regulation have failed as well to recognize this salient characteristic. *See* note 10 *infra*. By failing to accord this regulaton the appropriate degree of deference, these courts have impermissibly substituted their own judgment as to the interpretation of the statute for that of the Treasury Department.

governing statutory provision, ERISA's antiforfeiture requirement, 29 U.S.C. §1053(a) (1976). Before turning to their claim, we think it is appropriate to acknowledge that fidelity to the standard of review set forth in *Baker* and *Batterton, supra,* requires that a legislative regulation be invalidated only for a clear and manifest conflict with the governing statute. Overturning a legislative regulation where the statute may arguably be given conflicting readings, or where the conflict between the regulation and the statute is not plain, does violence to the congressional intent to delegate rule-making authority to the administrative agency. Approached from this perspective, the conclusions reached by the district courts in *Buczynski* and *Alessi,* that the regulation is inconsistent with 29 U.S.C. §1053(a) (1976), cannot be sustained: The legislative history affirmatively supports the Treasury regulation, and, at the very least, any conflict between the regulation and the statute, if one indeed exists, is clearly insufficient to mandate invalidation.

B.

The district courts here, as well as the other courts that have invalidated this regulation,[10] make similar syllogistic arguments to demonstrate the conflict with ERISA which they perceive. They begin with §1053(a), which provides broadly that pension benefits must be

10. In addition to *Buczynski* and *Alessi,* offset provisions have been declared unlawful, and the Treasury regulation has been invalidated, in Strong v. Bucyrus-Erie, 472 F. Supp. 1089 (E.D. Wis. 1979); Utility Workers' Union v. Consumers Power Co., 453 F. Supp. 447 (E.D. Mich. 1978), *appeal docketed,* No. 78-1402 (6th Cir., August 2, 1978); and Carpenter Technology Corp. v. Boyton, No. 78-1415 (D.N.J., Dec. 12, 1979). Offset provisions, and the Treasury regulation authorizing them, have been *upheld* in Bordine v. Evans Products Co., 453 F. Supp. 19 (E.D. Mich. 1978); Pavlovic v. Chrysler Corp., No. 7-70438 (E.D. Mich., Jan. 10, 1978), and Carlson v. Bundy Corp., No. 6-72272 (E.D. Mich. 1977).

nonforfeitable. They then focus on §1053(a)(3), which specifically exempts certain pension plan provisions from the nonforfeitability rule. The list of these exceptions includes, *inter alia,* nonpayment of benefits if the plan participant dies, §1053(a)(3)(A), and suspension of benefits if the participant takes a job with an employer in the same industry, §1053(a)(3)(B). This list, however, does not include offsets for Workmen's Compensation. Finally, these district courts add to §1053(a) the definition of "nonforfeitable" found in 29 U.S.C. §1002(19) (1976), which provides:

> (19) The term "nonforfeitable" when used with respect to a pension benefit or right means a claim obtained by a participant or his beneficiary to that part of an immediate or deferred benefit under a pension plan which arises from the participant's service, which is unconditional, and which is legally enforceable against the plan. For purposes of this paragraph, a right to an accrued benefit derived from employer contributions *shall not be treated as forfeitable merely because the plan contains a provision described in section 1053(a)(3) of this title.* (emphasis added).

Armed with these provisions, these district courts reason as follows: all reductions in benefits are forfeitures; all forfeitures are prohibited by §1053(a), with the sole exceptions being those listed in §1053(a)(3); Workmen's Compensation offsets are not included in the list of permissible forfeitures in §1053(a)(3); *ergo,* Workmen's Compensation offsets are prohibited forfeitures. Thus, they conclude that the Treasury regulation authorizing offsets for benefits provided under Federal or State law is in conflict with ERISA, and is therefore invalid, because it expands the class of permissible forfeitures beyond those specifically set forth in

§1053(a)(3). The *Buczynski* district court, in its second opinion, makes the argument as follows:

> Another difficulty with the defendant's interpretation results from ERISA's handling of the term "nonforfeitable". 29 U.S.C. §1002(19) provides the definition. Under this section, only the exceptions specifically included in §1053 are consistent with nonforfeitability. Worker's compensation does not appear. Only deductions included in §1053(a)(3) are exceptions to §1002's definition of nonforfeitability.
>
> Based on these cases, I must conclude it is clear that Congress expected that pension benefits would generally be nonforfeitable, and that employees would forfeit benefits only under narrowly defined circumstances. Regulations promulgated must assist in achieving this goal. Treas.Reg. §1.411(a)-4(a), by impeding the attainment of this goal, is inconsistent with the statute. Accordingly, the defendant's reliance on it as a source of expanding the scope of permissible deductions from pension payments is misplaced. Section 1053 forbids the offsets found in the defendant's plan.

464 F. Supp. at 135-36 (footnotes and citations omitted).

Thereafter, the district court in *Alessi*, relying on the *Buczynski* opinions, reached the same result. *See Alessi v. Raybestos-Manhattan*, No. 78-0434, slip op. at 5 (D.N.J., Feb. 15, 1979).

While this argument is not without some superficial appeal, the courts' syllogism is defective, and we must reject it. Understanding this defect, however, requires some explanation of the regulation of pension plans by the Internal Revenue Service before and after ERISA was enacted.

Prior to enactment of ERISA in 1974, the Internal Revenue Code set forth a variety of requirements that had to be met by pension plans in order to qualify for fa-

vorable tax treatment. One requirement was that the plans be nondiscriminatory. This tax code requirement was set forth in 26 U.S.C. §401(a)(4) & (5). On the passage of ERISA, these sections were amended, but the amendments did not alter the basic aim of the statute. Discrimination in contributions or benefits under a pension plan was still prohibited. These sections now provide in pertinent part:

> (a) Requirements for qualification. — A trust created or organized in the United States and forming part of a stock bonus, pension, or profit-sharing plan of an employer for the exclusive benefit of his employees or their beneficiaries shall constitute a qualified trust under this section—
>
> * * *
>
> (4) If the contributions or the benefits provided under the plan do not discriminate in favor of employees who are—
>
> (A) officers,
>
> (B) shareholders, or
>
> (C) highly compensated.
>
> * * *
>
> (5) . . . [A] plan [shall not] be considered discriminatory . . . merely because the contributions or benefits of or on behalf of the employees under the plan . . . differ because of any retirement benefits created under State or Federal law. . . .

Under these sections, the IRS prior to ERISA had extensive experience with a pension plan provision similar to the offset clause challenged here. That provision was the offset of Social Security benefits against pension benefits. In its interpretation of the clause excerpted above from 26 U.S.C. §401(a)(5), the IRS had long permitted pension plans to offset pension benefits by the amount of Social Security benefits that a plan partici-

pant received. The first such regulation was issued in 1943, and it simply reiterated the statutory language quoted above. The current version of this regulation, issued in 1960, provides as follows:

> (b) A plan . . . under which the contributions or benefits differ because of any retirement benefit created under State or Federal law, will not be discriminatory because of such exclusion or difference, provided the total benefits resulting under the plan and under such law establish an integrated and correlated retirement system satisfying the tests of section 401(a).

26 C.F.R. §1.401-4(b) (1979).

The parties do not dispute that this regulation permits offset of pension benefits by the amount of Social Security benefits received.

In enacting ERISA, Congress was familiar with the practice of the IRS allowing such offset provisions. Congress was also aware that the IRS, while allowing such offsets, would not permit any *increase* in the rate of offset based upon any *increase* in the level of Social Security benefits occurring after a retiree began to receive his pension. Congress sought to codify this administrative practice of not permitting an increased offset based upon *increased* Social Security benefits, and did so by enacting §1021(e) of ERISA, which is codified at 26 U.S.C. §401(a)(15) (1976). This section provides:

> (15) a trust shall not constitute a qualified trust under this section unless under the plan of which such trust is a part . . . such benefits are not *decreased* by reason of *any increase* in the benefit levels payable under title II of the Social Security Act or *any increase* in the wage base under such title II, if such increase takes place after September 2, 1974, or (if later) the earlier of the date of first re-

ceipt of such benefits or the date of such separation, as the case may be. (emphasis added).

Congress's understanding in enacting this section is made clear in the report of the House Ways and Means Committee:

> Protection is given to retired individuals and individuals who are separated from the service of the employer against reductions in private plan benefits when social security benefit levels increase. In general, under present integration [*i.e.*, offset] procedures, social security benefits attributable to employer contributions are treated as though they were part of the private plan. As a result when the level of social security benefits increases, some integrated plans have reduced the amount of the retirement benefits that they provide for covered employees.
>
> Present law under administrative practice provides that qualified plans may not use increases in social security benefit levels to reduce the benefits that they pay where the employees concerned are retired and are already receiving integrated plan benefits. The bill codifies this treatment for retired persons. It also extends the prohibition against reducing plan benefits where social security benefit levels are increased to cases where the individuals concerned are separated from service prior to retirement and have deferred nonforfeitable rights to plan benefits. This provision is effective for increases in social security benefits which take place after the date of enactment or on the date of the first receipt of plan benefits or the date of separation from service (whichever is applic) if that date is later.
>
> These changes do not affect the ability of plans to use the integration procedures to reduce the benefits that they pay to individuals who are currently covered when social security benefits are liberalized.

H.R. Rep. No. 93-807, 3 U.S. Code Cong. & Admin. News 4670, 4695-96 (1974).

Despite certain misgivings about offset, or integration practices expressed later in this report, Congress chose *not* to bar the Social Security offset entirely, but merely to prohibit *increases* in the amount of the offset based on *increases* in the amount of Social Security benefits.

A number of conclusions can be drawn from this history, conclusions which shed light on the analysis on which the *Alessi* and *Buczynski* courts relied in striking down the Treasury regulation. In choosing only to limit *increased* Social Security offsets rather than bar them entirely in §401(a)(15), Congress gave its implicit approval to the practice of permitting offsets against pension plan benefits — in that instance, an offset of Social Security benefits against pension plan benefits. Further, since §401(a)(15) was enacted at the same time as §1053(a)'s requirement that pension benefits be nonforfeitable, we must conclude that the offset of Social Security benefits implicitly approved in the former section was *not* simultaneously rendered illegal by the latter section's requirement of nonforfeitability.

This conclusion reveals the primary defect in the *Buczynski/Alessi* district court analyses. Those courts reasoned, as noted above, that all benefit reductions are forfeitures, and all forfeitures are impermissible except for the four exceptions listed in §1053(a)(3). Yet Congress has approved the Social Security offset, and that offset does not appear among the permissible forfeitures under §1053(a)(3). Thus, the district courts' reasoning runs afoul of Congress's approval of the Social Security offset. If all reductions in benefits are forfeitures, and all forfeitures are prohibited with the exceptions listed in §1053(a)(3), then, under the district courts' reasoning, Social Security offsets should also be prohibited. Yet, as we have seen, this is not the case. It is true, as the courts

reasoned, that all *forfeitures* are prohibited with the exception of those listed in §1053(a)(3), but it *cannot* be true that all reductions in benefits are necessarily forfeitures. Congress's implicit approval of the Social Security offset compels the conclusion that such an offset is *not* a forfeiture. Thus, the very basis on which the district courts found the Treasury regulation in issue here to conflict with §1053(a) is in error.

The plaintiffs contend, however, that the Workmen's Compensation offset cannot be sustained on the strength of Congress's approval of the Social Security offset. They contend that even if the Social Security offset is not a forfeiture under ERISA, the Workmen's Compensation offset *is*. Social Security benefits and pension benefits, they point out, are both designed to compensate for wages lost as a result of old age, and therefore the Social Security offset simply avoids a duplication of benefits directed to the same end. Workmen's Compensation, by contrast, is designed to compensate for losses flowing from employment related injuries; thus, the Workmen's Compensation offset, unlike the Social Security offset, cannot be defended as a means to avoid duplication of benefits.

The plaintiffs' argument here fails to recognize the breadth of the Social Security program. Social Security provides benefits for *disabilities*, *see* 42 U.S.C. §423 (1976), as well as benefits for old age. Thus, the Social Security offset that Congress has approved includes, perforce, an offset against pension benefits for *disability* benefits. The Social Security offset, since it includes an offset of disability benefits, makes any purported distinction between the Social Security offset and the Workmen's Compensation offset meaningless. The disability offset, included within the Social Security offset, thus compels us to reject any purported distinction between Social Security offsets and Workmen's Compensation offsets.

And the same argument may be made with respect to benefits provided under the Railroad Retirement Act, 45 U.S.C. §231 *et seq.* (1976). The same implicit congressional approval of offsets of Social Security benefits that appears in 26 U.S.C. §401(a)(15) (1976) is accorded to offsets of Railroad Retirement Act benefits in 29 U.S.C. §1056(b) (1976).[11] Railroad retirement benefits include payments for disability as well as payments for old age. *See* 45 U.S.C. §231a(a)(1)(iv) & (v) (1976). Thus, Congress has implicitly approved two disability offsets against retirement payments. As a result, reliance on the difference in the character of the offsets (retirement benefits as opposed to disability benefits) is misplaced.

The conclusion that not all benefit reductions are forfeitures; that, specifically, a Social Security offset is not a forfeiture; and that the district courts' reasoning is erroneous, is enough by itself to require upholding the Treasury regulation under the review of legislative regulations prescribed by *Baker v. Otis Elevator* and *Batterton v. Francis*. Once we conclude that Social Security offsets are not forfeitures, in the absence of clear evidence that Congress intended to prohibit Workmen's Compensation offsets, it cannot be said that a regulation allowing Workmen's Compensation offsets is so contrary to ERISA that it cannot stand. Thus, we conclude that there is an insufficient basis on which to strike down the regulation.

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11. 29 U.S.C. §1056(b) provides in pertinent part:

> [A] plan may not *decrease* benefits of such a participant by reason of any increase in the benefit levels payable under title II of the *Social Security Act or the Railroad Retirement Act of 1937*, or any *increase* in the wage base under such title II, if such increase takes place after September 2, 1974, or (if later) the earlier of the date of first entitlement of such benefits or the date of such separation. (emphasis added).

Appendix A

C.

Our conclusion that a proper interpretation of ERISA requires giving binding effect to this regulation receives further support in the legislative history of the Act. That history demonstrates to our satisfaction that Congress did not disapprove of Workmen's Compensation offsets as well as Social Security offsets.

In the course of IRS administration of the nondiscrimination requirement for pension plans under 26 U.S.C. §401(a)(4) & (5) (1976), the Service issued a revenue ruling explicitly approving an offset for Workmen's Compensation:

> Section 401(a)(5) of the Code provides that a plan shall not be considered discriminatory merely because the contributions or benefits of or on behalf of the employees under the plan differ because of any retirement benefits created under State or Federal law.
>
> The effect of section 401(a)(5) of the Code is to permit total benefits inclusive of those provided under the social security or similar program, to be used for comparative purposes. *See* Part 4(j) of Revenue Ruling, 65-178, C.B. 1965-2, 94. A program, like the social security program, that requires employer contributions and makes benefits available to the general public is a similar program for purposes of Part 4(j) of Revenue Ruling 65-178.
>
> Further, section 401(a)(5) of the Code does not provide for the offset of benefits under a qualified plan by disability damages recovered from an employer in a common law action. Such disability damages are not paid under a program similar to the social security program and offsetting retirement benefits by disability damages of this type would result in the plan being used to satisfy the employer's liability for damages.

Appendix A

> Since the benefits payable under a *workmen's compensation law or occupational diseases law* are available to the general public, it is held that *benefits payable under such laws are acceptable as an offset against benefits payable under the qualified pension plan* in the instant case. However, benefits under the plan may not be offset by disability damages recovered by an employee in a common law action against the employer. (emphasis added).

Rev. Rul. 68-243, 1968-1 C.B. 157, 158.

The substance of this ruling has been republished by the IRS on two occasions.[12]

The legislative history of ERISA indicates that Congress was familiar with the IRS rules on integration of benefits in pension plans, and intended that these rules

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12. In 1969, the IRS published an extensive Revenue Ruling consolidating and updating the rules on qualification of pension plans under 26 U.S.C. §401 (1976). This ruling contained the same position expressed in Revenue Ruling 68-243:

> (4) *Integration With Benefits Provided Under Other Public Programs.* — Benefits provided under a pension, annuity, profit-sharing, or stock bonus plan may be integrated with those provided under a state or Federal program that, like the social security program, requires employer contributions and makes benefits available to the general public. *Thus, benefits payable under a state workmen's compensation law or an occupational diseases law may be an acceptable offset against benefits payable under a qualified plan.* However, benefits payable under a qualified plan may not be offset by disability damages recovered by an employee in a common law action against the employer. *See* Rev. Rul. 68-243, C.B. 1968-1, 157. (emphasis added).

Rev. Rul. 69-421, part 4, (j)(4), 1969-2 C.B. 61, 72.

This same provision was included without change in a special IRS publication in 1972. Internal Revenue Service, Pub. No. 778, Guides for Qualification of Pension, Profit-Sharing, and Stock Bonus Plans 15 (1972).

be preserved. The report of the Conference Committee states:

> Moreover, the conferees intend that the antidiscrimination rules of present law in areas other than the vesting schedule are not to be changed. Thus, the present antidiscrimination rules with respect to coverage, and with respect to contributions and benefits are to remain in effect. Also, the antidiscrimination rules may be applied with respect to benefit accruals.

H. Conf. Rep. No. 93-1280, 3 U.S. Code Cong. & Admin. News 5038, 5058 (1974).

This history of IRS practice with respect to Workmen's Compensation offsets, and of congressional preservation of the antidiscrimination rules, suggests that, if anything, Congress approved of Workmen's Compensation offsets. Thus, the evidence indicates that the Treasury regulation in issue here conforms to congressional intent. Accordingly, because the regulation is not contrary to §1053(a) and the provisions of ERISA as a whole, we must sustain its validity.[13]

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13. An additional argument in support of the position taken by GM and Raybestos was made by the *amicus* steel companies. They called our attention to a proposal made in Congress by Senators Harrison Williams and Jacob Javits, two of the original sponsors of ERISA. The proposal, if enacted into law, which it was not, would have prohibited Workmen's Compensation offsets. The proposal states:

> (a) Section 206(b) of such Act [ERISA] is amended
>
> * * * *
>
> (3) by adding at the end thereof the following new sentence: "A pension plan may not reduce or suspend retirement pension benefits being received by a participant or beneficiary or retirement pension benefits in which a participant who is separated from the service has a nonforfeitable right by reason of any payment made to the participant or beneficiary by the

III.

Our conclusion that the Treasury regulation must be sustained does not, by itself, require granting judgment in favor of the defendants. For even if ERISA does not prohibit the Workmen's Compensation offset in the GM and Raybestos pension plans, New Jersey's 1977 statute *does*. This statute, as noted earlier, provides in relevant part:

> The right of compensation granted by this chapter [the workmen's compensation act] may be set off

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employer maintaining the plan as the result of an award or settlement made under or pursuant to a workers' compensation laws."

As we understand the argument, the steel companies contend that there would have been no need for the introduction of such a proposal unless ERISA as originally enacted, and as currently in force, permitted Workmen's Compensation offsets.

While certainly plausible, we do not attribute much weight to this argument. The difficulty with it, as with all arguments of this nature, is that the understanding of the amendment's sponsors is open to conflicting interpretations. It is possible that the sponsors believed that such offsets were permissible under the original ERISA. It is also possible, however, that they believed that such offsets were *impermissible* under ERISA as enacted, and sought the amendment to override the Treasury regulation that erroneously, in their view, authorized such offsets. Thus, the argument cuts both ways.

Two additional arguments, attacking our conclusion that the regulation is valid, are made by *amici* Gray Panthers and Steelworkers. Neither of these arguments merits discussion. They argue that the regulation conflicts with 29 U.S.C. §1056(d)(1) (1976), which provides that pension plan benefits "may not be assigned or alienated," and with 29 U.S.C. §1103(c)(1) (1976), which provides that "the assets of a plan shall never inure to the benefit of any employer, and shall be held for the exclusive purposes of providing benefits to participants in the plan and their beneficiaries and defraying reasonable expenses of administering the plan." In our opinion, the discussion and analysis found in part II, *supra*, which demonstrates an overriding congressional intent to permit Workmen's Compensation offsets against pension benefits, disposes of these contentions as well.

against disability pension benefits or payments but shall not be set off against employees' retirement pension benefits or payments.

N.J. Stat. Ann. §34:15-29 (Supp. 1979).

The statute, of course, prohibits the offset clause challenged here, and the defendants do not contend otherwise. They do claim, however, that this statute is superseded by ERISA's preemption provision, 29 U.S.C. §1144(a) (1976).[14] This section states:

(a) Except as provided in subsection (b) of this section,[15] the provisions of this subchapter and subchapter III of this chapter shall supersede any

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14. The State of New Jersey, which has intervened in both *Buczynski* and *Alessi*, asks us to abstain from deciding the preemption question. It suggests that if we await a New Jersey state court interpretation of the statute, it may obviate our consideration of the preemption claim. The state suggests that the New Jersey courts are likely to hold that N.J. Stat. Ann. §34:15-29 (Supp. 1979) protects employees who obtained Workmen's Compensation judgments after the statute went into effect. Since all the plaintiffs in *Alessi* and all the named plaintiffs in *Buczynski* recovered their judgments before the effective date of the statute, it does not, New Jersey argues, protect them and there is no need to determine whether the statute is preempted by ERISA.

However, we decline to abstain for two reasons. First, the construction of the statute that New Jersey proposes will not forever remove the need for consideration of the preemption question. It will simply postpone consideration until a claim is made by an employee who recovered a Workmen's Compensation award after July 14, 1977 and it appears to us that such a claim is not far off. Second, and of greater importance, the certified class in *Buczynski* appears to include persons who recovered Workmen's Compensation judgments after the statute's effective date. *See* note 3 *supra*. Thus, there are plaintiffs in this suit who are protected by the statute regardless of how the New Jersey courts may construe the statute. In this posture, then, we are obliged to resolve the preemption claim.

15 None of the exceptions referred to are applicable here, and the plaintiffs do not argue to the contrary.

and all State laws insofar as they may now or hereafter relate to any employee benefit plan described in section 1003(a) of this title and not exempt under section 1003(b) of this title. This section shall take effect on January 1, 1975.

The district court judge in *Buczynski*, despite his conclusion that the offset provision was unlawful under ERISA itself, nevertheless discussed the preemption issue. The district court in *Buczynski*, followed thereafter by *Alessi*, concluded that the New Jersey statute was not preempted:

> It is true that under ERISA, 29 U.S.C. §1144(a), all state laws which "relate to" any employee benefit plan covered by ERISA are superseded. Although the New Jersey statute undoubtedly "relates to" pension plans in the broadest dictionary sense of that term, this court cannot agree with the defendant that the New Jersey statute "relates to" pension plans within the meaning of ERISA, 29 U.S.C. §1144(a). Congress, to be sure, must have intended by that language to occupy the entire field of pension plan law to the exclusion of all state regulation. However, the New Jersey statute at issue here is in no way concerned with pension plans *qua* pension plans. On the contrary, the New Jersey statute is solely concerned with protecting the employee's right to worker's compensation disability benefits. . . .
>
> Congress, by enacting ERISA, and the specific preemptive language of 29 U.S.C. §1144(a), could not have intended to prohibit states from protecting an employee's state-created right to worker's compensation benefits by enacting laws such as the one New Jersey enacted here.

456 F. Supp. at 872-73 (citations omitted).

Our reading of ERISA satisfies us that ERISA *does* preempt N.J. Stat. Ann. §34:15-29 (Supp. 1979). Thus, we cannot agree with the district courts that have concluded otherwise.[16] The primary purpose of the statute, and its direct effect, is to prohibit pension plans from offsetting Workmen's Compensation benefits against pension retirement benefits. It simply cannot be said that this statute does not concern pension plans *qua* pension plans (*Buczynski*), or that its effect on such plans is merely collateral (*Alessi*). In our opinion, the *only* purpose and effect of the statute is to set forth an additional statutory requirement for pension plans; this purpose negates the characterization of the statute attributed to it by the New Jersey district courts.

Further, ERISA preempts state statutes that "*relate to* any employee benefit plan," 29 U.S.C. §1144(a) (1976) (emphasis added). The view taken by the *Buczynski* court, that ERISA preempts only statutes concerning "pension plans *qua* pension plans," could be accepted only if ERISA's preemption clause were much more narrowly drawn than it is. Here, the preemption clause, reaching statutes that "relate to" pension plans, has an obviously broader scope

In noting that "the New Jersey statute undoubtedly 'relates to' pension plans in the broadest dictionary sense of that term," 456 F. Supp. at 872, the district court in *Buczynski* appears to concede the difficulty of its narrow interpretation. The court reasoned, however, that Congress could not have intended the term to be given its full breadth. Yet the legislative history of the clause, as well as the plain meaning of its language, belie this claim. The legislative history of the clause has been de-

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16. As previously noted, *see* note 6 *supra*, still another New Jersey district court has addressed this preemption question, and agrees with our conclusion that the New Jersey statute is preempted by ERISA. *See* Carpenter Technology Corp. v. Boyton, No. 78-1415, slip op. at 5-9 (D.N.J., Dec. 12, 1979).

tailed elsewhere and we need not repeat it here. *See Wadsworth v. Whaland*, 562 F.2d 70, 76-77 (1st Cir. 1977), *cert. denied*, 435 U.S. 980 (1978); *National Carriers' Conference Comm. v. Heffernan*, 454 F. Supp. 914, 915-17 (D. Conn. 1978); *Hewlett-Packard Co. v. Barnes*, 425 F. Supp. 1294, 1297-1300 (N.D. Cal. 1977), *aff'd per curiam*, 571 F.2d 502 (9th Cir.), *cert. denied*, 439 U.S. 831 (1978). We need only note its most prominent features: that the original House and Senate provisions were significantly narrower, and were rejected by the Conference Committee in favor of the current provision; and that explanations of the Conference substitute given on the floor of both chambers make plain that the preemptive intent is just as broad as its language suggests. Thus, it is clear that the preemption provision is intended to be read in its normal dictionary sense, and that the New Jersey statute prohibiting Workmen's Compensation offsets cannot stand.[17]

IV.

We conclude that the Workmen's Compensation offset in General Motors's and Raybestos's pension plans is not a forfeiture rendered invalid by ERISA's antiforfeiture provision, 29 U.S.C. §1053(a) (1976). In so concluding, we sustain the Treasury regulation expressly authorizing provisions of this type, 26 C.F.R. §1.411(a)-4(a) (1979). We also conclude that the New Jersey statute that prohibits these offsets, N.J. Stat. Ann. §34:15-29 (Supp. 1979), is preempted by ERISA, 29 U.S.C. §1144(a) (1976).

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17. Raybestos, in the district court in Alessi, contended that the New Jersey statute should be struck down on at least two other grounds. First, that the statute was preempted under the National Labor Relations Act, and, second, that it was an unconstitutional impairment of the obligation of contracts. The court rejected both of these attacks, slip op. at 8-9. In light of our conclusion that the statute is preempted by ERISA itself, we need not reach these issues.

Appendix A

In light of our conclusions, which are contrary to the conclusions reached by the district courts in both *Buczynski* and *Alessi*, we will vacate the respective orders dated April 3, 1979 (*Buczynski*) and March 1, 1979 (*Alessi*) which permanently enjoin the defendants from offsetting Workmen's Compensation benefits and which required that reimbursement be made for amounts offset in the past; we direct that the district courts enter judgment for the defendants. Each side shall bear its own costs.

A True Copy:

Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

APPENDIX B

Judgment of the United States Court of Appeals for the Third Circuit

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

No. 79-1534

ALESSI, JOSEPH, RAYMOND BUISSON, STEPHEN MICHALSKI, CHARLES REPKS, HELEN VOGT AND T. EDWARD WHITE

vs.

RAYBESTOS-MANHATTAN, INC. AND RAYBESTOS-MANHATTAN, INC., EMPLOYEE RETIREMENT PLAN JOINTLY, SEVERALLY AND IN THE ALTERNATIVE,

Appellants,

STATE OF NEW JERSEY,

Intervenor.

(D. C. Civil No. 78-0434)

No. 79-1668

BUCZYNSKI, HENRY, ALEX BORUSOVIC AND OTHER RETIREES SIMILARLY SITUATED

vs.

Appendix B

THE GENERAL MOTORS CORPORATION,

Appellant,

STATE OF NEW JERSEY,

Intervenor.

(D. C. Civil No. 77-1644)

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

Present: GIBBONS, ROSEN and GARTH, *Circuit Judges*

JUDGMENT

These causes came on to be heard on the records from the United States District Court for the District of New Jersey and were argued by counsel on January 8, 1980.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgments of the said District Court dated April 3, 1979 and appealed at our No. 79-1668, and dated March 1, 1979, and appealed at our No. 79-1534, be, and the same are hereby vacated and the causes are remanded to the said District Courts for entry of judgments for the defendants, all in accordance with the opinion of this Court. Each side shall bear its own costs.

Appendix B

Attest:

THOMAS F. QUINN
Clerk

Certified as a true copy and issued in lieu of a formal mandate on March 27, 1980.

February 15, 1980

Test:

THOMAS F. QUINN
Clerk, United States Court of Appeals for the Third Circuit

APPENDIX C

Order of the United States Court of Appeals for the Third Circuit Denying Petition for Rehearing

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

No. 79-1668

HENRY BUCZYNSKI, ALEX BORUSOVIC AND OTHER RETIREES SIMILARLY SITUATED,

Plaintiffs-Appellees,

THE GENERAL MOTORS CORPORATION,

Defendant-Appellant,

STATE OF NEW JERSEY,

Intervenor.

SUR PETITION FOR REHEARING

Present: ALDISERT, GIBBONS, ROSENN, HUNTER, WEIS, GARTH, HIGGINBOTHAM AND SLOVITER,

Circuit Judges

The petition for rehearing filed by Plaintiffs-Appellees in the above entitled case having been submitted to the judges who participated in the decision of this court and

to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

Dated: March 19, 1980

By the Court,

Leonard I. Garth
Judge
Leonard I. Garth, U.S.C.J.

APPENDIX D

Petition for Removal

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEW JERSEY

Civil Action No. 77-1644

HENRY BUCZYNSKI, ALEX BORUSOVIC AND OTHER RETIREES SIMILARLY SITUATED,

Plaintiffs,

—VS—

THE GENERAL MOTORS CORPORATION,

Defendant.

TO THE JUDGES OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY:

The Petition of General Motors Corporation, for removal of this action from the Superior Court of New Jersey, Chancery Division, Union County, to the United States District Court for the District of New Jersey, respectfully shows to this Honorable Court:

1. That your Petitioner, General Motors Corporation, is the defendant in a civil action brought against it in the Chancery Division of the Superior Court of the State of New Jersey, Union County, entitled, "Henry Buczynski, Alex Borusovic and Other Retirees Similarly Situated,

Plaintiffs, vs. The General Motors Corporation, Defendant," a copy of the Complaint (and annexed Affidavits) and Order to Show Cause in which action are annexed hereto and made parts hereof as Exhibits A and B, respectively, the same constituting all the process, pleadings, and orders served upon your Petitioner in said action.

2. That the aforesaid action was commenced by the filing of said Complaint and Order to Show Cause on August 5, 1977, said Complaint and Order to Show Cause having been received by your Petitioner on August 9, 1977.

3. That your Petitioner was, at the time of the commencement of the aforesaid action, and now is, a corporation duly organized and existing under and by virtue of the laws of the State of Delaware, and an employer and the administrator of an employee pension benefit plan within the meaning of the Employee Retirement Income Security Act of 1974, 29 U.S.C. §1001 *et seq.*, and was and is engaged in commerce within the meaning of Section 301 (a) of the Labor Management Relations Act, 1947, 29 U.S.C. §185(a).

4. That the aforesaid action is a suit alleging a violation of the rights of the plaintiffs under a contract between an employee and a labor organization representing employees in an industry affecting commerce and an action by a participant or beneficiary of an employee pension benefit plan to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan, within the meaning of Section 502(a) of the Employee Retirement Income Security Act of 1974, 29 U.S.C. §1132(a), and a civil action of which the United

States District Courts have original jurisdiction under and pursuant to the provisions of Section 301(a) of the Labor Management Relations Act, 1947, 29 U.S.C. §185(a), Section 502(e) of the Employee Retirement Income Security Act of 1974, 29 U.S.C. §1132(e)(1), and 28 U.S.C. §1331, and a civil action which may be removed to this Court pursuant to the provisions of 28 U.S.C. §1441.

5. That your Petitioner files and presents herewith a bond, with good and sufficient surety, in the penal sum of Five Hundred Dollars ($500.00), conditioned, as required by 28 U.S.C. §1446(d), that Petitioner will pay all costs and disbursements incurred by reason of these removal proceedings should it be determined that this cause is not removable or is improperly removed.

WHEREFORE, your Petitioner prays that this cause proceed in this Court as an action properly removed thereto.

CARPENTER, BENNETT & MORRISSEY
Attorneys for Defendant-Petitioner
General Motors Corporation
By: LAURENCE REICH
A Member of the Firm
744 Broad Street
Newark, New Jersey 07102
(201) 622-7711

Dated: August 9, 1977

Appendix D

Order Certifying Class Action, Etc.

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEW JERSEY

(Hon. Frederick B. Lacey)

Civil Action No. 77-1644

HENRY BUCZYNSKI, ALEX BORUSOVIC AND OTHER RETIREES SIMILARLY SITUATED,

Plaintiffs,

—VS—

THE GENERAL MOTORS CORPORATION,

Defendant.

This matter having been opened to the Court by Lester Weiner, Esq., attorney for plaintiffs, on the application of plaintiffs for an order certifying the above-entitled action as a class action, and the Court noting the consent of the parties hereto to the entry of this Order, and good cause appearing,

IT IS, on this 9th day of August, 1978,

ORDERED, that this action be and it hereby is certified as a class action pursuant to Rule 23(b)(2) of the Federal Rules of Civil Procedure; and it is

Appendix D

FURTHER ORDERED, that the class be and it hereby is certified as consisting of those persons who are retired members of the General Motors Corporation Hourly-Rate Employes Pension Plan who retired under the provisions of said Pension Plan as set forth in Exhibit A-1 to the Agreement between General Motors Corporation and the International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, datad November 11, 1970, November 19, 1973, or November 22, 1976, who retired with benefits payable for months commencing on or after April 1, 1971, and who, at the time of their retirement, were employed by General Motors Corporation in New Jersey; and it is

FURTHER ORDERED, that the above-entitled action be and it hereby is set down for Pretrial Conference before Honorable William J. Hunt at 9:00 A.M. on April 10, 1978, and for trial before this Court on May 1, 1978.

FREDERICK B. LACEY, U.S.D.J.

We hereby consent to the making and entry of the foregoing Order.

LESTER WEINER
Attorney for Plaintiffs
By: MARC C. GETTIS

CARPENTER, BENNETT & MORRISSEY
Attorneys for Defendant
By: LAURENCE REICH
A Member of the Firm

JOHN J. DEGNAN
Attorney General of the State of New Jersey
Attorney for Intervenor
By: MICHAEL S. BOKAR
Deputy Attorney General

Appendix D

Memorandum Opinion of the United States District Court for the District of New Jersey (August 24, 1978)

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

Civil No. 77-1644

HENRY BUCZYNSKI, ALEX BORUSOVIC, and OTHER RETIREES SIMILARLY SITUATED,

Plaintiffs,

v.

GENERAL MOTORS CORPORATION,

Defendant.

LACEY, D.J.

Plaintiffs in this class action[1] are retired employees of defendant General Motors Corporation who had been re-

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[1] The certified class consists "of those persons who are retired members of the General Motors Corporation Hourly-Rate Employees Pension Plan who retired under the provisions of said Pension Plan as set forth in Exhibit A-1 to the Agreement between General Motors Corporation and the International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, dated November 11, 1970, November 19, 1973, or November 22, 1976, who retired with benefits payable for months commencing on or after April 1, 1971, and who, at the time of their retirement, were employed by General Motors Corporation in New Jersey." See order filed August 9, 1978.

ceiving retirement pension benefits from the defendant pursuant to a pension plan negotiated between the defendant and plaintiffs' union. After the plaintiffs received worker's compensation payments pursuant to New Jersey's Worker's Compensation Act,[2] the defendants reduced the plaintiffs' benefits under the plan by an amount equal to those payments, pursuant to Article IV, Section 2, of the plan.

The plaintiffs contend that the defendant cannot lawfully make such deductions in their pension benefits. They seek reimbursement of all pension benefits thus withheld and a permanent injunction against all such future deductions which are predicated upon the receipt of worker's compensation payments.

For the reasons set forth below, the plaintiffs are entitled to the relief they seek.

Dealing first with the issue of subject matter jurisdiction in this removed matter, 28 U.S.C. § 1441, I conclude I have such jurisdiction to decide the issues. Even were there any question about the propriety of removal by the defendant, neither side has questioned it. Since it is clear I would have had original jurisdiction over the claims presented here, a valid judgment can be entered with respect to them.[3] *Grubbs* v. *General Electric Credit Corp.*, 405 U.S. 699, 702 (1972).

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[2] N.J.S.A. 34:15 *et seq.*

[3] Thus, this court would have had original subject matter jurisdiction over the instant action under the Labor Management Relations Act of 1947, 29 U.S.C. § 185(a) and under the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. §§ 1132(f), 1132(a)(3).

Moreover, this court has removal jurisdiction over plaintiffs' state court action under 28 U.S.C. § 1441(a)(b), predicated upon 29 U.S.C. § 185(a).

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The complaint as filed alleges that the plaintiffs are retired employees of the defendant, that they have been receiving pension benefits under a Pension Plan Agreement between their union and the defendant, that they have obtained judgments entitling them to worker's compensation benefits, and that the defendant threatens to reduce their pension benefits because they have recovered worker's compensation benefits. The complaint sets forth Article IV, Section 2 of the Pension Plan Agreement:

> In determining the monthly benefits payable under this Plan, a deduction shall be made *unless prohibited by law,* equivalent to all or any part of Workmen's Compensation (including compromise or redemption settlements) payable to such employee by reason of any law of the United States, or any political subdivision thereof, which has been or shall be enacted, provided that such deductions shall be to the extent that such Workmen's Compensation has been provided by premiums, taxes or other payments paid by or at the expense of the Corporation, except that no deduction shall be made for the following:
>
> (a) Workmen's Compensation payments specifically allocated for hospitalization or medical expense, fixed statutory payments for the loss of any bodily member, or 100% loss of use of any bodily member, or payments for loss of industrial vision.
>
> (b) Compromise or redemption settlements payable prior to the date monthly pension benefits first become payable.
>
> (c) Workmen's Compensation payments paid under a claim filed not later than two years after the breaking of seniority. (emphasis added)

The complaint then alleges that the deductions threatened by the defendant are now in violation of a recent amendment to New Jersey's Worker's Compensation Act[4] which provides that:[5] "The right of compensation granted by this chapter may bet set off against disability pension benefits or payments but shall not be set off against employees' retirement pension benefits or payments." The complaint concludes with a prayer for a permanent injunction against the threatened deductions.

Plaintiffs' action, therefore, is predicated upon an alleged breach or violation of the "unless prohibited by law" clause of the Pension Plan Agreement.[6] Thus they argue that, since Article IV, Section 2 of the Pension Plan Agreement bars the defendant from offsetting pension benefits against worker's compensation benefits where "prohibited by law," and the New Jersey Worker's Compensation Act embodies such a prohibition, the continued deductions violate the express provisions of the Pension Plan Agreement.

The complaint did not advance a claim founded upon a theory that the offset provision is unlawful under ERISA. That claim was first raised indirectly when plaintiffs' counsel brought to this court's attention the recently decided

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[4] There is no allegation that defendant threatens to make the deductions in plaintiffs' pension benefits contrary to the three exceptions to the offset provision contained in subdivisions (a), (b), or (c) of Article IV, Section 2 of the Pension Plan Agreement.

[5] L. 1977, c. 156 § 1, eff. July 14, 1977, amending N.J.S.A. 34:15-29.

[6] Subsequent to the filing of the complaint, the defendant has been making the deductions in plaintiffs' pension benefits and has made it clear that it will continue to do so.

Appendix D

Utility Workers Union of America v. *Consumers Power Co.*, No. 7-71747 (E.D.Mich., filed June 13, 1978). The defendant's response was not a claim of prejudice by reason of a belated addition to plaintiffs' bag of legal theories of recovery.[7] Instead, the defendant responded by referring the court to another case[8] in the same court, the Eastern District of Michigan, which was decided contrary to the *Utility Workers* case.

The defendant, as I have noted, admits all of the material allegations necessary to a decision on the question of whether ERISA itself bars the offset involved, including that the pension plan falls within the coverage of ERISA. *See* 29 U.S.C. § 1003.

Thus, I perceive no prejudice to the defendant in addressing the issue of the lawfulness of the offsetting in question under 29 U.S.C. § 1053 of ERISA. *See* 5 Wright & Miller, Federal Practice and Procedure, Civil, § 1219.[9]

---

[7] The defendant contended only that the ERISA claim was "entirely outside the scope of the pleadings and proof now before the court" and that the *Utility Workers* case was therefore irrelevant. Letter to Court, dated July 26, 1978.

[8] *Bordine* v. *Evans Product Co.*, No. 7-71652 (E.D. Mich., filed April 6, 1978).

[9] Once a federal court has removal jurisdiction, a party may amend his complaint to assert a federal claim that could not have been presented in the state court. *Freeman* v. *Bee Machine Co.*, 319 U.S. 448 (1943). This court has removal jurisdiction over plaintiffs' breach of contract claim which was asserted in state court. *See* n.3 *supra*. Thus, under *Freeman*, the plaintiffs could have amended their complaint here to assert the unlawfulness of the offset provision under ERISA, 29 U.S.C. § 1053, a claim over which this court has original subject matter jurisdiction under 29 U.S.C. § 1132(f).

Appendix D

The Offset Provision of the Pension Plan Is Unlawful Under ERISA

The minimum vesting standards provision of ERISA, 29 U.S.C. § 1053, provides in pertinent part that:

> (a) Each pension plan shall provide that an employee's right to his normal retirement benefits is nonforfeitable upon the attainment of normal retirement age and in addition shall satisfy the requirements of paragraphs (1) and (2) of this subsection.
>
> (1) A plan satisfies the requirements of this paragraph if an employee's rights in his accrued benefit derived from his own contributions are nonforfeitable.
>
> (2) A plan satisfies the requirements of this paragraph if it satisfies the requirements of subparagraph (A), (B), or (C).
>
> (A) A plan satisfies the requirements of this subparagraph if an employee who has at least 10 years of service has a nonforfeitable right to 100 percent of his accrued benefit derived from employer contributions.[10]

• • •

[10] Subparagraph (B) provides for an alternate pension plan under which an employee can obtain a nonforfeitable right to an increasingly higher percentage of his accrued benefit derived from employer contributions depending upon his years of service. For example, an employee who has served at least 5 years would have a nonforfeitable right to 25% of his accrued benefit, while an employee who had served at least 15 years would have a nonforfeitable right to 100% of his accrued benefit.

(Footnote continued on following page)

Appendix D

In *Utility Workers,* it was held that a provision in a pension plan falling within the coverage of ERISA which provides that retirement pension benefits are to be offset against worker's compensation benefits is unlawful under ERISA, 29 U.S.C. § 1053. This court is in full agreement with the well-reasoned opinion in that case.[11]

Under ERISA, a pension plan must provide that an employee's rights in his accrued benefits derived from his own contributions is nonforfeitable.[12] The pension plan must also provide that an employee has a nonforfeitable right to a certain percentage of his accrued benefit derived

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(Footnote continued from preceding page)

Subparagraph (C) provides for yet a third alternate pension plan under which an employee can obtain a nonforfeitable right to an increasingly higher percentage of his accrued benefit derived from employer contributions depending upon his years of service and his age. For example, where an employee has served at least 5 years and the sum of his age and service is at least 45, he has a nonforfeitable right to 50% of his accrued benefit; but where an employee has at least 10 years of service and the sum of his age and service is at least 55, he has a nonforfeitable right to 100% of his accrued benefit.

It is immaterial whether plaintiffs' pension plan is one predicated upon subparagraph (A), (B), or (C) of 29 U.S.C. § 1053 (a)(2).

[11] This court rejects the contrary holding in the case of *Bordine, supra* note 9, at 4.

[12] ERISA does not provide for any exceptions to the nonforfeitability requirement in the case of accrued benefits derived from employee contributions.

from employer contributions,[13] the particular percentage depending upon (1) his years of service or (2) his years of service and his age.

When a pension plan, such as the one under consideration here, makes the employee's right to a certain percentage of his accrued benefit derived from employer contributions conditional upon a factor other than years of service or years of service and age, the plan is unlawful, unless the factor is one of those set forth in 29 U.S.C. § 1053(a)(3).

The pension plan herein makes the plaintiffs' rights to their accrued benefits conditional upon their not obtaining worker's compensation benefits. Such a factor is not one of those set forth in 29 U.S.C. § 1053(a)(3).[14] As a result, the pension plan is unlawful.[15]

---

[13] The court will assume that plaintiffs' pension plan is fully funded by the defendant.

[14] 29 U.S.C. § 1053(a)(3) legalizes pension plans which provide that an employee's right to an accrued benefit is forfeitable if he dies, if he is employed in certain types of industries, if certain amendments are made retroactive, or if he withdraws any amount attributable to the benefit derived from mandatory contributions made by him.

[15] In addition to *Utility Workers, see also Riley* v. *MEBA Pension Trust,* 570 F.2d 406, 409 (2d Cir. 1977).

Appendix D

The Offset Provision of the Pension Plan Is Void Under the "Unless Prohibited By Law" Clause of the Pension Plan

As noted previously, the Pension Plan Agreement between the defendant and the plaintiffs' union provides that retirement pension benefits may be offset against worker's compensation benefits "unless prohibited by law." At the final hearing in this case on May 15, 1978, the testimony established that after a number of years' absence from the General Motors' pension plan, the offset provision reappeared in the 1970 pension plan.[16] The testimony also established that it was the defendant which proposed the reinsertion of the offset provision into the pension plan because there had been a "deluge" of worker's compensation cases from which the defendant sought "relief."[17] The "unless prohibited by law" clause was also proposed by the defendant. The "unless prohibited by law" clause "meant just as the language indicated, pure and simple, that if there were states then having state laws which prohibited an offset and if in the future there would be state laws that prohibited offset that would be applicable and it was just that pure and simple.[18]

---

[16] The offset provision was continued in the 1973 and 1976 pension plans. All three plans contain the "unless prohibited by law" clause. Stipulation of December 7, 1977.

[17] Testimony of Hubert Clodfelder, Union Negotiator, Hearing of May 15, 1978, Tr. at 8. The pension plan being negotiated was to apply to 130 General Motors' plants located in at least thirty states.

[18] *Id.* at 10.

Appendix D

The defendant admits that the deductions it is making in plaintiffs' retirement pension benefits are prohibited by the recent amendment to New Jersey's Worker's Compensation Act. The defendant contends, however, that that amendment is unconstitutional under the Supremacy Clause of the United States Constitution, in that it has been preempted by ERISA, 29 U.S.C. § 1144(a),[19] which provides that:

> (a) Except as provided in subsection (b) of this section, the provisions of this subchapter and subchapter III of this chapter shall supercede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan described in section 1003(a) of this title and not exempt under section 1003(b) of this title. This section shall take effect on January 1, 1975.

As I have already indicated in the preceding section of this opinion, the offset provision of the pension plan is unlawful under ERISA, 29 U.S.C. § 1053. The New Jersey statute, insofar as it is merely duplicative of ERISA, is preempted by that federal statute. *Rogers* v. *Larson,* 563 F.2d 617, 621 (3d Cir. 1977), appeal filed, 46 U.S.L.W. 3529 (U.S. Jan. 20, 1978).

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[19] The defendant also contends that the New Jersey statute is preempted by the National Labor Relations Act, as amended, 29 U.S.C. § 141 *et seq.* This contention, however, is without merit, since the parties specifically agreed that the offset provision of the pension plan would be inapplicable if it was prohibited by state law. By applying the recent amendment to New Jersey's Worker's Compensation Act to bar the offset of pension benefits against worker's compensation benefits, this court would be doing nothing more than enforcing the agreement between the parties reached after the give and take of collective bargaining.

However, assuming *arguendo* that ERISA does not outlaw the offset provision of the pension plan, it becomes necessary to determine whether the specific preemptive langu .ge of ERISA, 29 U.S.C. § 1144(a), renders the New Jersey statute null and void as applied to the facts of this case. If the New Jersey statute is not preempted by ERISA, the offset provision of the pension plan was rendered null and void by the "unless prohibited by law" clause of the pension plan when the recent amendment to New Jersey's Worker's Compensation Act became effective on July 14, 1977.

In determining whether the New Jersey statute is preempted,[20] this court is guided by the opinion of the Court of Appeals for the Third Circuit in the case of *Rogers* v. *Larson, supra* at 620-21, wherein the court discussed the three preemption "tests":

> The Supreme Court has . . . established three grounds upon which a local statute may be deemed pre-empted by federal law. It will be pre-empted (1) if "Congress has unmistakenly so ordained," or (2) if "the nature of the regulated subject matter permits no other conclusion" but pre-emption, or (3) if it violates the Supremacy Clause by standing "as an obstacle to the accomplishment and execution of

[20] The court reiterates that this discussion is predicated upon the assumption that the offset provision of the pension plan is *not* unlawful under ERISA.

> the full purposes and objectives of Congress." (citation omitted)[21]

The touchstone of all three preemption tests is Congressional intent to preempt. *Rogers* v. *Larson, supra* at 621 n.8.

The defendant contends that the New Jersey statute is preempted under the first preemption test, in that Congress, through the specific preemptive language of ERISA, 29 U.S.C. § 1144(a), "unmistakenly" intended to preempt this state law.[22]

It is true that under ERISA, 29 U.S.C. § 1144(a), all state laws which "relate to" any employee benefit plan covered by ERISA are superseded. Although the New

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[21] With respect to the last two tests, the court explained that:

> We understand the second test to mean that the subject matter of the federal and local laws is such that the two laws or regulatory schemes must inherently either conflict or be duplicative. That is, under this test it is impossible for there to be local regulation in the subject area that does not conflict with or duplicate federal regulation.
>
> The third test is applied when there is room in the subject area for both federal and local regulation. This test requires the court to examine both statutory schemes to determine if they can co-exist or if they conflict.

Rogers v. *Larson*, 563 F.2d 617, 621 (3d Cir. 1977), appeal filed, 46 U.S.L.W. 3529 (U.S. Jan. 20, 1978).

[22] The defendant does not argue that the New Jersey statute is preempted under either preemption test (2) or (3). It is clear to this court that the statute is not preempted under either of those tests.

Jersey statute undoubtedly "relates to" pension plans in the broadest dictionary sense of that term, this court cannot agree with the defendant that the New Jersey statute "relates to" pension plans within the meaning of ERISA, 29 U.S.C. § 1144(a). Congress, to be sure, must have intended by that language to occupy the entire field of pension plan law to the exclusion of all state regulation. *See Allied Structural Steel Co.* v. *Spannaus,* 46 U.S.L.W. 4887, 4889 n.8 (U.S. June 28, 1978); *Malone* v. *White Motor Corp.,* 46 U.S.L.W. 4295 n.1 (U.S. April 3, 1978); *Marshall* v. *Chase Manhattan Bank,* 558 F.2d 680, 683 (2d Cir. 1977). However, the New Jersey statute at issue here is in no way concerned with pension plans *qua* pension plans. On the contrary, the New Jersey statute is solely concerned with protecting the employee's right to worker's compensation disability benefits. This is clear from the language of the statute itself. The statute provides that worker's compensation benefits may be set off against *disability* pension benefits, but not against *retirement* pension benefits. Thus, under the statute an employee is not entitled to double compensation for a work-related disability, once under the Worker's Compensation Act, and once under his pension plan. On the other hand, an employee *is* entitled to be compensated at least *once* for his work-related disability. It is self-evident that if an employee can receive compensation for his work-related disability under New Jersey's Worker's Compensation Act just to have an equal amount taken away from his retirement pension benefits, the employee, in reality, has been deprived of compensation for his work-related disability.[23] *Utility Workers Union*

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[23] It is obvious that an employer could not justify, upon any rational basis, giving one employee less retirement pension benefits than another employee solely on the basis that the former employee has a work-related disability while the latter does not.

of America v. *Consumers Power Co., supra,* slip op. at 16 n.12. The New Jersey statute forbids such a result.

Congress, by enacting ERISA, and the specific preemptive language of 29 U.S.C. § 1144(a), could not have intended to prohibit states from protecting an employee's state-created right to worker's compensation benefits by enacting laws such as the one New Jersey enacted here. That Congress recognizes state law preeminence in the field of worker's compensation law is clear from ERISA itself which exempts from the coverage of ERISA an employee benefit plan "maintained solely for the purpose of complying with applicable workmen's compensation laws. . . ." 29 U.S.C. § 1003(b)(4).[24]

That New Jersey had a strong interest in enacting the recent amendment to its Worker's Compensation Act cannot be denied. That Act "was intended to place the cost of accidental injuries which are work-connected upon employers, who may provide for them as operating expenses. *Renshaw* v. *United States Pipe & Foundry Co.,* 30 N.J. 458 (1959); *Tocci* v. *Tessler and Weiss, Inc.,* 28 N.J. 582 (1959)." *Daniello* v. *Machise Express Co.,* 119 N.J. Super 20, 24 (LawDiv. 1972), *aff'd,* 122 N.J. Super 144 (App. Div. 1973). Where a disability is compensable under that statute, a common law suit by the employee against his employer is unavailable. *Dudley* v. *Victory Lynn Lines, Inc.,* 32 N.J. 479 (1960). Consequently, if an employer can avoid his statutory duty to provide compensation to his

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[24] This court assumes that plaintiffs' pension plan is not such a plan. Nevertheless, 29 U.S.C. § 1003(b)(3) is relevant to determining Congressional intent with respect to the term "relate to" in 29 U.S.C. § 1144(a).

employees for work-related disabilities, the employee is without any remedy at all. If an employer can reduce an employee's retirement pension benefits by an amount equal to the employee's award of worker's compensation disability benefits, the employer has accomplished just that—he has avoided his statutory obligation to compensate the employee for his work-related disability. Thus, New Jersey had a strong interest in closing that "loophole" in its Worker's Compensation Act by enacting the recent amendment under consideration here.

In *Farmer* v. *Carpenters,* 430 U.S. 290, 302 (1977), the Supreme Court stated that:

> Our cases indicate, however, that inflexible application of the [preemption] doctrine is to be avoided, especially where the State has a substantial interest in regulation of the conduct at issue and the State's interest is one that does not threaten undue interference with the federal regulatory scheme.

While it is true that the Court in that case was speaking of the National Labor Relations Act, as amended, which, unlike ERISA, does not contain specific preemptive language, the statement is nevertheless relevant in discerning Congressional intent with respect to the term "relate to" in ERISA, 29 U.S.C. § 1144(a).

The State of New Jersey's substantial interest in enacting the recent amendment to its Worker's Compensation Act has already been demonstrated. Moreover, this court cannot discern how that amendment threatens any interference with the federal regulatory scheme of ERISA, let alone undue interference. Finally, since the amendment simply does not relate to pension plans *qua* pension plans, but is instead directed towards protecting an em-

ployee's right to worker's compensation benefits, this court concludes that Congress did not intend to preempt the amendment by enacting ERISA and the preemptive language of 29 U.S.C. § 1144(a).[25]

CONCLUSION

I hold as follows:

1. Plaintiffs are entitled to the relief they seek because the offset provision of their pension plan is unlawful under ERISA, 29 U.S.C. § 1053.

2. Assuming *arguendo* that Congress did not outlaw the offset provision by enacting ERISA, Congress did not intend ERISA to prohibit the states from outlawing such offset provisions. Consequently, the plaintiffs are entitled to the relief they seek because the offset provision of the pension plan was rendered null and void by the "unless prohibited by law" clause of the pension plan when the State of New Jersey amended its Worker's Compensation Act on July 14, 1977 so as to prohibit offsets of retirement pension benefits against worker's compensaiton benefits.

FREDERICK B. LACEY
United States District Judge

Dated: August 24, 1978

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[25] Plaintiffs' contention that 29 U.S.C. § 1144(a) is inapplicable to the case at bar by reason of 29 U.S.C. § 1144(b)(1) is without merit. That provision provides as follows:

> (b)(1) This section shall not apply with respect to any cause of action which arose, or any act or omission which occurred, before January 1, 1975.

Consequently, this court has found it necessary to consider the meaning of 29 U.S.C. § 1144(a) as applied to the facts of this case.

Appendix D

Opinion of the United States District Court for the District of New Jersey (December 20, 1978)

UNITED STATES DISTRICT COURT

DISTRICT OF NEW JERSEY

Civil No. 77-1644

HENRY BUCZYNSKI, et al.,

Plaintiffs,

v.

GENERAL MOTORS CORPORATION,

Defendant.

LACEY, D.J.

The defendant moves for reconsideration of this court's decision embodied in an opinion and order filed August 24, 1978. That decision invalidated reductions by the defendant in the pension payments made to the plaintiffs in an amount equal to the value of payments received under the New Jersey Worker's Compensation Act, N.J.S.A. 34:15 *et seq.* Struck down was the pension plan's provision allowing this offset, Article IV, Section 2, on two separate grounds: first, that the offsets were unlawful under 29 U.S.C. § 1053; second, even if Congress did not forbid these pension deductions, New Jersey was not barred by the preemption doctrine from passing a law which effectively

outlawed this offset under the "unless prohibited by law" clause of the plan.

The defendant, in its motion to reconsider, challenges both rationales upon which the earlier decision was grounded.

29 U.S.C. § 1053

The defendant's action, I previously had held, violated the minimum vesting section of ERISA, 29 U.S.C. § 1053, by failing to make nonforfeitable the plaintiffs' rights to their retirement benefits. The defendant, arguing that the offsets do not constitute a forfeiture within the meaning of ERISA, relies on Treas. Reg. § 1.411(a)-4(a), which provides:

> Furthermore, nonforfeitable rights are not to be considered to be forfeitable by reason of the fact that they may be reduced to take into account benefits which are provided under the Social Security Act or under any other Federal or State law and which are taken into account in determining plan benefits.

Two courts have applied this regulation to hold that deducting worker's compensation payments from pension payments does not offend ERISA's nonforfeitability requirement. *Bordine* v. *Evans Products Co.*, 453 F.Supp. 19 (E.D. Mich. 1978); *Pavlovic* v. *Chrysler Corp.*, Civ. No. 7-70438 (E.D. Mich. January 10, 1978).[1]

Plaintiffs have placed in issue the validity of the aforesaid regulation. Although Treasury Regulations are ac-

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[1] *Contra, Utility Workers Union* v. *Consumers Power Co.*, 453 F.Supp. 447, 455 n.11 (E.D. Mich. 1978).

corded great respect and are not lightly overruled, *see Bingler* v. *Johnson,* 394 U.S. 741, 479-51 (1969), a Treasury Regulation that is inconsistent with Congressional enactments cannot stand. *United States* v. *Cartwright,* 411 U.S. 546, 557 (1973). A regulation will be struck down if it is inconsistent with the plain wording of a federal statute, *Busse* v. *Commissioner,* 479 F.2d 1147, 1152-53 (7th Cir. 1973), or if the regulation "conflict[s] with the philosophy and avowed purpose of legislation." *New York Shipbuilding Corp.* v. *United States,* 237 F.Supp. 995, 999 (D.N.J. 1965), *aff'd,* 362 F.2d 551 (3d Cir. 1966) (per curiam). Thus, the existence of a regulation does not end the inquiry.

First, the plaintiffs claim the Secretary of the Treasury is powerless to prescribe regulations affecting pension rights under 29 U.S.C. § 1053. This contention is without merit.

Thus, 29 U.S.C. § 1202(c) provides:

> Regulations prescribed by the Secretary of the Treasury under sections 410(a), 411, and 412 of Title 26 . . . shall also apply to the minimum participation, vesting, and funding standards set forth in parts 2 and 3 of subtitle B of subchapter I of this chapter.

Treas. Reg. § 1.411(a)-4(a) was issued to give guidance in interpreting 26 U.S.C. § 411; and 29 U.S.C. § 1053, entitled "minimum vesting standards," is located in part 2 of subtitle B of subchapter I. Accordingly, the Secretary of the Treasury had the authority to promulgate a binding regulation regarding § 1053.

Next to be considered is whether the aforesaid regulation is consistent with ERISA. The defendant's argument that it is requires careful analysis. First, the defendant points to 26 U.S.C. § 401, which states the requirements

for qualifying a pension plan. One requirement is that the plan be nondiscriminatory. A plan is not considered discriminatory "merely because the contributions or benefits . . . differ because of any retirement benefits created under State or Federal law." § 401(a)(5). In interpreting this statute, the Internal Revenue Service has ruled that a plan could provide that worker's compensation benefits could be offset against pension benefits without the plan being discriminatory. Rev.Rul. 68-243. Next, the defendant notes that Congress, in enacting ERISA, did not modify of 26 U.S.C. § 401(a)(5). Also, Congress explicitly stated that it "intend[ed] that the anti-discrimination rules of present law in areas other than the vesting schedule are not to be changed." H.R. Rep. No. 93-1280, 93rd Cong., 1st Sess., *reprinted in* [1974] U.S. Code Cong. & Ad. News 5038, 5058. Thus, defendant argues, because the pre-ERISA rules permitted deductions for worker's compensation benefits and this policy regarding nondiscrimination was continued by Congress, it therefore follows that Treas. Reg. § 1.411(a)-4(a) is consistent with ERISA generally and with § 1053 in particular.

This convoluted skein of reasoning is unconvincing. First, it is questionable that Congressional intent concerning 26 U.S.C. § 401 indicates anything at all about Congressional intent as to nonforfeitability under § 1053. *See Riley* v. *MEBA Pension Trust,* 570 F.2d 406, 409 n.3 (2d Cir. 1977). The legislative history of ERISA underscores this. Under the heading of "permitted forfeitures of vested rights," Congress declared that "an employee's rights, once vested, are [with certain exceptions] not to be forfeitable for any reason. An employee's rights to benefits attributable to his own contributions may never be forfeited." H.R. Rep. No. 93-1280, 93rd Cong., 1st Sess., *reprinted in* [1974] U.S.

Code Cong. & Ad. News 5038, 5052. The report then lists a series of exceptions to the principle that an employee's vested rights are not forfeitable. None of these exceptions mention worker's compensation.

Another difficulty with the defendant's interpretation results from ERISA's handling of the term nonforfeitable. 29 U.S.C. § 1002(19) provides the definition.[2] Under this section only the exceptions specifically included in § 1053 are consistent with nonforfeitability. Worker's compensation does not appear. Only deductions included in § 1053 (a)(3) are exceptions to § 1002's definition of nonforfeitability. *See Riley* v. *MEBA Pension Trust, supra,* 570 F.2d at 409; *Utility Workers Union* v. *Consumer Powers Co., supra,* 453 F.Supp. at 456; *Keller* v. *Graphic Systems of Akron, Inc.,* 422 F.Supp. 1005, 1008 (N.D. Ohio 1976).

Based on these cases, I must conclude it is clear that Congress expected that pension benefits would generally be nonforfeitable, and that employees would forfeit benefits only under narrowly defined circumstances. Regulations promulgated must assist in achieving this goal. *See United States* v. *Bacto-Undisk,* 394 U.S. 784 (1969); *New York Shipbuilding Corp. supra.* Treas. Reg. §1.411(a)-

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[2] The term "nonforfeitable" when used with respect to a pension benefit or right means a claim obtained by a participant or his beneficiary to that part of an immediate or deferred benefit under a pension plan which arises from the participant's service, which is unconditional, and which is legally enforceable against the plan. For purposes of this paragraph, a right to an accrued benefit from employer contributions shall not be treated as forfeitable merely because the plan contains a provision described in § 1053(a)(3) of this title.

4(a), by impeding the attainment of this goal, is inconsistent with the statute. Accordingly, the defendant's reliance on it as a source of expanding the scope of permissible deductions from pension payments is misplaced. Section 1053 forbids the offsets found in the defendant's plan.[3]

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[3] The defendant makes two other arguments to sustain its position. Noting that the same phrase appears in both 26 U.S.C. § 401(a)(5) and in 29 U.S.C. § 1082(c)(4)(A), the defendant takes this as evidence of the continued vitality of Rev.Rul. 68-243, which upheld offsets for Worker's Compensation as not being discriminatory for the purposes of 26 U.S.C. § 401(a)(4), suggesting that § 1053 also allows offsets. As was said in *Utility Workers Union, supra*: "The language of the statute is clear and unambiguous. The reasoning of the defendant is tenuous and speculative. The Court chooses to follow the plain meaning of the statutory language." 453 F.Supp. at 456.

The defendant also refers the court to 29 C.F.R. § 2605, stressing the language in the definitions in subsection 2:

> "Pension Benefit" means a benefit payable as an annuity, or one or more payments related thereto, to a participant who permanently leaves . . . which payments by themselves or in combination with Social Security, Railroad Retirement, or workmen's compensation benefits provide a substantially level income to the recipient.

Under this regulation, the defendant argues, the Pension Benefit Guarantee Corporation (PBGC) has authorized reducing pension benefits if worker's compensation is provided. This regulation suffers from the same defects as does the Treasury Regulation, (Treas, Reg. § 1.411(a)-4(a), except that it is without a statutory basis and derives no support from the legislative history.

Appendix D

N.J.S.A. 34:15-29

The defendant also argues that the court erred in finding that the New Jersey law forbidding the offsets[4] (L. 1977, c.156 § 1, eff. July 14, 1977, amending N.J.S.A. 34:15-29) was not preempted by ERISA. The Third Circuit Court of Appeals recently enumerated the three grounds for preempting a state statute. In its motion for reconsideration, the defendant strongly contends that the New Jersey statute is invalid due to the second ground: "'the nature of the regulated subject matter permits no other conclusion' but pre-emption." *Rogers* v. *Larson,* 563 F.2d 617, 621 (3d Cir. 1977), *appeal filed,* 46 U.S.L.W. 3529 (U.S. Jan. 20, 1978) (citations omitted). Elaborating further, the court stated that this basis for preemption existed when "the subject matter of the federal and local laws . . . must inherently either conflict or be dupli-

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[4] The defendant again argues that preemption should be found under 29 U.S.C. § 1144(a) because the New Jersey law "relates to" pension plans. The defendant cites several cases in which preemption has been found. While those cases are useful in illuminating the Congressional intent underlying ERISA, the cases are not dispositive. "Our prior cases on pre-emption are not precise guidelines in the present controversy, for each case turns on the peculiarities and special features of the federal regulatory scheme in question." City of Burbank v. Lockheed Air Terminal, Inc., 411 U.S. 624, 639 (1973) (citations omitted). The same is also true with respect to the state regulation in question, for whether preemption by ERISA can be found will depend on the exact nature of the state laws. *Compare* National Carriers' Conference Comm. v. Heffernan, 454 F.Supp. 914 (D. Conn. 1978) *and* Standard Oil Co. of Cal. v. Agsauld, 442 F.Supp. 695, 707 (N.D. Cal. 1977) *with* Stone v. Stone, 450 F.Supp. 919, 931-33 (N.D. Cal. 1978) *and* Gast v. State, 47 U.S.L.W. 1067 (Oct. 31, 1978 Oregon). The court's conclusion that the New Jersey Worker's Compensation Law does not "relate to" pensions will be adhered to. *See also* Johnston v. Johnston, 47 U.S.L.W. 2331 (Oct. 27, 1978 California).

cative. That is, under this test it is impossible for there to be local regulation in the subject area that does not conflict with or duplicate federal regulation." *Id.*

For the purpose of analyzing preemption, this court, in its earlier opinion, assumed *arguendo* that ERISA did not forbid the offsets and that the New Jersey law was not on its face inconsistent with the federal enactment. If Congress had plainly declared that deductions for worker's compensation payments were allowed, or if the New Jersey law frustrated the Congressional purpose, then the Supremacy Clause would compel the striking down of New Jersey's law. *Ray* v. *Atlantic Richfield Co.*, 46 U.S.L.W. 4200, 4201 (1978). Thus, in treating the preemption question, it will continue to be assumed that Congress has not addressed the permissibility of offsets, either to allow them or to prohibit them.[5] Under this assumption, it is clear the New Jersey statute is not preempted, based upon the wording of the second ground of *Rogers* v. *Larson, supra.* It neither duplicates nor conflicts with ERISA.

This conclusion, aside from being compelled by *Rogers* v. *Larson, supra,* also follows from general principles of preemption. In a field historically falling within the sphere of state regulation, preemption will not be found unless a clear Congressional intent to preempt is found. *Jones* v. *Rath Packing Co.*, 430 U.S. 519, 525 (1977). As determined in my earlier opinion, that clear expression

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[5] Consonant with the earlier opinion, the court still views the legislative history as being one consistent with the forbidding of offsets. To the extent that this history reveals Congressional intent to be unclear, in no way can the legislative history be said to support the contrary conclusion, that offsets were to be permitted.

of intent is absent. New Jersey's statute lies within the allowable range of police activity that gives rise to the presumption against preemption.

> States possess broad authority under their police power to regulate the employment relationship to protect workers within the State. Child labor laws, minimum and other wage laws, laws affecting occupational health and safety, and *workmen's compensation laws* are only a few examples.

De Canas v. *Bica*, 424 U.S. 351, 356 (1976) (emphasis added)

After noting that the California statute challenged as being preempted belonged in the category of traditional state police powers, the Court found no preemption under the preemption test that "the nature of the . . . subject matter permits no other conclusion." *Id.*, quoting *Florida Lime & Avocado Growers, Inc.* v. *Paul*, 373 U.S. 132 (1963). *Rogers* v. *Larson, supra*, derives from this portion of *De Canas* its second ground for preemption; this shows that New Jersey's strong interest in worker's compensation will be a significant factor militating against finding preemption.

Another important rule in deciding preemption cases is that state and federal regulatory schemes should be harmonized, if possible. "[W]e may not overlook the body of law relating to the sensitive interrelationship between statutes adopted by the separate, yet coordinate, federal and state sovereignties." *Merrill Lynch Pierce Fenner & Smith, Inc.* v. *Ware*, 414 U.S. 117, 127 (1973). The Court then went on to hold that California could apply its statute voiding restraints on competition,

despite the fact that the rule which the petitioner sought to enforce had been promulgated pursuant to federal statute. The Court observed that "California has manifested a strong policy of protecting its wage earners from what it regards as undesirable economic pressures affecting the employment relationship. This policy prevails in the absence of interference with the federal regulatory scheme." *Id.* at 139-40.

Accordingly, given that the New Jersey statute neither duplicates nor conflicts with ERISA, that Worker's Compensation forms an area of strong public interest to New Jersey, see Memorandum Opinion at 9-10, and that the court is under a duty due to the nature of the federal system to try to validate proper exercises of the state police power, preemption does not exist. The offsets by the defendant are therefore barred by the "unless prohibited by law" clause.

Conclusion

Upon reconsideration, the previous decision of this court is followed.

Frederick B. Lacey
United States District Judge

Dated: December 20, 1978

Appendix D

Amended Order Filed April 5, 1979

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEW JERSEY

Civil Action No. 77-1644

(Hon. Frederick B. Lacey)

HENRY BUCZYNSKI, ALEX BORUSOVIC AND OTHER RETIREES SIMILARLY SITUATED,

Plaintiffs,

—VS—

THE GENERAL MOTORS CORPORATION,

Defendant.

The matter having come for trial before Honorable Frederick B. Lacey, U.S.D.J., upon the verified complaint and action for injunction of plaintiffs, Henry Buczynski and Alex Borusovic, and the class represented by them (Lester Weiner and Associates, Esqs., appearing for the plaintiffs, and Carpenter, Bennett & Morrissey, Esqs., appearing for defendant), and the court having certified the action as a class action, and the court having considered the testimony, stipulations of fact, briefs, memoranda, and arguments of counsel, and the court having filed a memorandum opinion on August 24, 1978 and the court having given reconsideration to its decision upon defendant's motion for

reconsideration, and the court having filed its opinion on December 20, 1978;

IT IS HEREBY ORDERED that the defendant, General Motors Corporation, is hereby permanently enjoined from making any deductions from retirement pensions payable to the plaintiffs and class members, other than benefits payable by reason of disability, pursuant to Article IV, section 2 of the General Motors Corporation Hourly-Rate Employes Pension Plan; and

IT IS FURTHER ORDERED that defendant shall pay over to each plaintiff and class member the amount of money deducted from his or her basic pension benefits, which benefits have been made payable as a result of having reached normal retirement age (together with interest from the date of deduction), within 30 days from the date of the Order; provided that in the event this court's judgment that the deduction violates 29 U.S.C. § 1053 is reversed, that defendant shall pay over within 30 days from the date of the entry of this Order all sums deducted from any retirement plan benefits, other than benefits payable by reason of disability (together with interest from the date of deduction), on or after July 14, 1977; and

IT IS FURTHER ORDERED that the provisions of this order are stayed during the pendency of the appeal.

Frederick B. Lacey
United States District Judge

Dated: April 3, 1979

APPENDIX E

Relevant Statutory Provisions

29 U.S.C. §1002(19)

(19) The term "nonforfeitable" when used with respect to a pension benefit or right means a claim obtained by a participant or his beneficiary to that part of an immediate or deferred benefit under a pension plan which arises from the participant's service, which is unconditional, and which is legally enforceable against the plan. For purposes of this paragraph, a right to an accrued benefit derived from employer contributions shall not be treated as forfeitable merely because the plan contains a provision described in section 1053(a)(3) of this title.

29 U.S.C. §1053(a)

§ 1053. Minimum vesting standards

(a) Each pension plan shall provide that an employee's right to his normal retirement benefit is nonforfeitable upon the attainment of normal retirement age and in addition shall satisfy the requirements of paragraphs (1) and (2) of this subsection.

(1) A plan satisfies the requirements of this paragraph if an employee's rights in his accrued benefit derived from his own contributions are nonforfeitable.

(2) A plan satisfies the requirements of this paragraph if it satisfies the requirements of subparagraph (A), (B), or (C).

Appendix E

(A) A plan satisfies the requirements of this subparagraph if an employee who has at least 10 years of service has a nonforfeitable right to 100 percent of his accrued benefit derived from employer contributions.

(B) A plan satisfies the requirements of this subparagraph if an employee who has completed at least 5 years of service has a nonforfeitable right to a percentage of his accrued benefit derived from employer contributions which percentage is not less than the percentage determined under the following table:

Years of service:	Nonforfeitable percentage
5	25
6	30
7	35
8	40
9	45
10	50
11	60
12	70
13	80
14	90
15 or more	100.

(C)(i) A plan satisfies the requirements of this subparagraph if a participant who is not separated

from the service, who has completed at least 5 years of service, and with respect to whom the sum of his age and years of service equals or exceeds 45, has a nonforfeitable right to a percentage of his accrued benefit derived from employer contributions determined under the following table:

If years of service equal or exceed—	and sum of age and service equals or exceeds—	then the nonforfeitable percentage is—
5	45	50
6	47	60
7	49	70
8	51	80
9	53	90
10	55	100.

(ii) Notwithstanding clause (i), a plan shall not be treated as satisfying the requirements of this subparagraph unless any participant who has completed at least 10 years of service has a nonforfeitable right to not less than 50 percent of his accrued benefit derived from employer contributions and to not less than an additional 10 percent for each additional year of service thereafter.

(3)(A) A right to an accrued benefit derived from employer contributions shall not be treated as forfeitable solely because the plan provides that it is not payable if the

participant dies (except in the case of a survivor annuity which is payable as provided in section 1055 of this title).

(B) A right to an accrued benefit derived from employer contributions shall not be treated as forfeitable solely because the plan provides that the payment of benefits is suspended for such period as the employee is employed, subsequent to the commencement of payment of such benefits—

(i) in the case of a plan other than a multiemployer plan, by an employer who maintains the plan under which such benefits were being paid; and

(ii) in the case of a multiemployer plan, in the same industry, in the same trade or craft, and the same geographic area covered by the plan, as when such benefits commenced.

The Secretary shall prescribe such regulations as may be necessary to carry out the purposes of this subparagraph including regulations with respect to the meaning of the term "employed".

(C) A right to an accrued benefit derived from employer contributions shall not be treated as forfeitable solely because plan amendments may be given retroactive application as provided in section 1082(c)(8) of this title.

(D)(i) A right to an accrued benefit derived from employer contributions shall not be treated as forfeitable solely because the plan provides that, in the case of a participant who does not have a nonforfeitable right to at least 50 percent of his accrued benefit derived from em-

ployer contributions, such accrued benefit may be forfeited on account of the withdrawal by the participant of any amount attributable to the benefit derived from mandatory contributions (as defined in the last sentence of section 1054(c)(2)(C) of this title) made by such participant.

(ii) Clause (i) shall not apply to a plan unless the plan provides that any accrued benefit forfeited under a plan provision described in such clause shall be restored upon repayment by the participant of the full amount of the withdrawal described in such clause plus, in the case of a defined benefit plan, interest. Such interest shall be computed on such amount at the rate determined for purposes of section 1054(c)(2)(C) of this title (if such subsection applies) on the date of such repayment (computed annually from the date of such withdrawal). In the case of a defined contribution plan the provision required under this clause may provide that such repayment must be made before the participant has any 1-year break in service commencing after the withdrawal.

(iii) In the case of accrued benefits derived from employer contributions which accrued before September 2, 1974, a right to such accrued benefit derived from employer contributions shall not be treated as forfeitable solely because the plan provides that an amount of such accrued benefit may be forfeited on account of the withdrawal by the participant of an amount attributable to the benefit derived from mandatory contributions, made by such participant before September 2, 1974, if such amount forfeited is proportional to such amount with-

drawn. This clause shall not apply to any plan to which any mandatory contribution is made after September 2, 1974. The Secretary of the Treasury shall prescribe such regulations as may be necessary to carry out the purposes of this clause.

(iv) For purposes of this subparagraph, in the case of any class-year plan, a withdrawal of employee contributions shall be treated as a withdrawal of such contributions on a plan year by plan year basis in succeeding order of time.

(v) Cross Reference.—

For nonforfeitably[1] where the employee has a nonforfeitable right to at least 50 percent of his accrued benefit, see section 1056(c) of this title.

29 U.S.C. §1144(a)

SUPERSEDURE; EFFECTIVE DATE

(a) Except as provided in subsection (b) of this section, the provisions of this subchapter and subchapter III of this chapter shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan described in section 1003(a) of this title and not exempt under section 1003(b) of this title. This section shall take effect on January 1, 1975.

Appendix E

N.J.S.A. 34:15-29. Compensation preferential lien; claim not assignable; set offs

The right of compensation granted by this chapter shall have the same preference against the assets of the employer as is now or may hereafter be allowed by law for a claim for unpaid wages for labor. Claims or payments due under this chapter shall not be assignable, and shall be exempt from all claims of creditors and from levy, execution or attachment. The right of compensation granted by this chapter may be set off against disability pension benefits or payments but not shall be set off against employees' retirement pension benefits or payments. Amended by L.1977, c.156, §1, eff. July 14, 1977.